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[illegible]IAGE IN HINDU LAW.

BEING A CRITICISM OF BASU'S CIVIL MARRIAGE BILL.*

INTRODUCTORY.

The object of this Bill is to extend the operation of Act III of 1872 to all religionists by dispensing with the declaration required by that enactment from persons taking advantage of it, that they do not profess any of the chief religions of India. The first question for consideration is whether the Bill can or is likely to become law in its present form. The Christians have a Civil Marriage Law in Part V of Act XV of 1872, the provisions of which are to some extent at variance with the provisions of this Bill. The Muhammadan law does not recognise marriage between a Muhammadan and a believer in many gods as valid, and that community is, it is to be taken, as a body opposed to the Bill. The Parsees and the Sikhs have got their own marriage laws, and none of the communities named above have asked for a change. In the Hindu community itself doubt has arisen in a most unexpected quarter; and reading between of the lines the memorial to the Government of India adopted in September last by the Bombay Social Reform Association one can see that the Bombay Reform party will be content with a Bill confined in its scope to Hindus only, while some members of the extreme party in Madras are of opinion that it will be sufficient for the present to merely legalise intermarriages between the sub-castes comprised under each primary Varna. It may, therefore, be safely assumed that if any law is passed as a result of the present discussions, it will be confined in its scope to the Hindu community only. It is proposed now to draw attention to certain aspects of the Bill as thus limited, which have not received sufficient emphasis in the discussions and in respect of which there is considerable misconception.

In their attempt to disarm opposition to the Bill many have argued that to the extent to which it legalises intermarriages between persons belonging to different main castes, the Bill merely brings about a reversion to the state of things which prevailed in the Golden Age of India.

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Arguments of the Advocates of the Bill.

The Hon'ble Mover of the Bill remarked in the Imperial Legislative Council :—" It cannot be denied that intermarriages between different Varnas were prevalent in ancient India and are sanctioned in Smritis and Samhitas...Manu, the great law-giver of the Hindus, sanctions the marriage of a Bra[illegible]h women of lower degrees though he reprobates the marria[illegible]ahman with a Sudra woman, a reprobation which shows th[illegible]e existed." Dr. P. C. Chatterji, (July number of the [illegible] a B[illegible]w), points out that Sanskrit literature is full of allusions to intermarriages between main castes and that all the Hindu law-givers recognize such intermarriages, the earlier commentaries mentioning the same without forbidding them. He therefore argues that there is no cogent reason why, if custom has changed in the past, it should not change now. The Hon'ble Mr. Justice Sankaran Nair, points out that though the sacred books discourage intermarriages, there is hardly any Hindu law-giver who does not recognise such marriages or classify their issue, and that an appeal from the moderately sacred to the undoubtedly sacred books of the past, such as the Upanishads and the Vedas, completely disarms the objection that the caste system as now understood in Courts of Law is an essential part of Hindu religion. He adds that it has also been placed beyond doubt that not only throughout the time of the Vedas, the Upanishads and the Puranas, but for most of the historical period and even in our own day intermarriages have frequently taken place. ("Contemporary Review," September, 1911). Similar views were expressed by Dr. Bhandarkar in the Bombay Reform Meeting of the 30th September 1911.

II. THE SMRITIS.

Megasthenes, the Greek ambassador in the Court of Chandragupta, speaks thus of the caste system from personal observation :—

Megasthenes.

" The custom of the country prohibits intermarriage between castes. No one is allowed to marry out of his own caste or to exchange one profession or trade for another. An exception is made in favour of the philosopher (Brahman) who for his virtue is allowed this privilege."* of following more than one occupation. The statement of Megasthenes refers to the country of Magadha in the fourth century before Christ and shows that the present prohibition of intercaste mariages has been in existence for at least twenty-two centuries. Even in earlier times

* M'crindle. Ancient India-Megasthenes and Arrian, pp. 85, 86, Ancient ndia 55.

when such in[illegible]ages were allowed it must be remembered that the law neve[illegible]sed Pratiloma marriages *i. e.*, the union of a woman with a [illegible]nging to a class *lower than herself*. To this extent the state[illegible]ted above, of the advocates of the Bill, are wholly incorrect, an[illegible]e only partially correct in regard to *Anuloma* or hypergamo[illegible]ges, as when a woman of one caste is married with due marriag[illegible]s to a man of a higher caste. This point will become obvious eve[illegible] from a cursory examination of the Smritis. I see there is a prejudice [illegible] some quarters against Manu who is sometimes called *recent* on account of the many interpolations in the code that goes by his name. I shall therefore take up his Smriti last and shall not accept any rule of his which is not found in other writers.

Mitakshara.

In *Yajnavalkya's* Smriti and *Vijnanesvara's* Mitakshara thereon castes are either pure or mixed. The pure castes are the four primary ones and are made up of the offspring of couples belonging to the same caste joined in holy wedlock (1-90) ; for instance, only those are *Kshatriyas* both of whose parents are *Kshatriyas*. The mixed castes fall under three heads—*Anulomaja*, *Pratilomaja* and *Samkirnasankara* —the last being composed of the offspring of the *Anulomaja* and *Pratilomaja* castes with one another and with the four primary castes (I. 91-95). Both Yajnavalkya and Vijnanesvara who use the word *Vivaha* or holy wedlock when speaking of the formation of the pure and the Anulomaja castes studiously avoid the use of this term when speaking of the genesis of Pratilomaja castes. There are six different Anulomaja castes—three born of Sudra mothers, two of Vaisya mothers and one of Kshatriya mothers—and six different Pratilomaja castes—three born of Brahman mothers, two of Kshatriya mothers and one of Vaisya mothers. Yajnavalkya characterises the Anulomaja castes by the word *Sat* (good) while the adjective used for the Pratilomaja castes is *Asat* (evil) (I. 95) * The Sankhasmriti which the Mitakshara quotes under verse I. 91, says that Anulomajas belong to the caste of the mother. Verse 1. 62. 2† and the Mitakshara thereon lay down that when the bride and bridegroom belong to the same caste the former should take hold of the hand of the bridegroom during the marriage ceremony ; but when the bridegroom belongs to a higher caste a Kshatriya bride should touch an arrow held by the bridegroom, and a Vaisya bride should touch a goad held by the bridegroom. No similar rules find place in the Smriti for *Pratiloma* unions. In the section dealing

* Asatsantastu vijneyah pratilomanulomajah.

† Panirgrihyah savarnasu grihniyat kshatriya saram. Vaisya-pratodam adadyat vedanety agrajanmanah.

with sexual offences the death penalty is prescribed for the man when he is of a caste lower than the woman's (II. 286).* It should be noted here that though Anulomaja castes born [illegible] mothers are mentioned by Yajnavalkya he does not admi[illegible] twice-born castes can *marry* a Sudra woman ; he says that t[illegible]ans can take wives only from the three twice-born castes, th[illegible]yas from two and the Vaisyas from only one (I-57). † The [illegible]takshara on verse 1-96 contains rules as to how mixed castes are elevated through the stages as it were of Mulatto, Quadrooon, Octaroon, &c. Thus, a Nishadi woman—the offspring of a Brahman on a Sudra woman—marrying a Brahmin produces a girl who again marries a Brahman ; in this manner the marriage of the daughter in the sixth generation produces a full Brahman. This rule is applicable to all Anulomaja castes.

Baudhayana.

Baudhayana says that a Brahman can take wives from all the four castes, a Kshatriya from three castes, a Vaisya from two, and a Sudra from his own caste only [(I. (8) 2-5]. 1. The offspring of a Brahman on a Kshatriya wife is a Brahman ; of a Kshatriya on a Vaisya wife is a Kshatriya ; of a Vaisya on a Sudra wife is a Vaisya [I (8) 6]. 2. With these exceptions the Anulomaja and Partilomaja castes are the same as in Yajnavalkya. There is a rule in regard to the elevation of the *Nishada* which differs from that in the Mitakshara, on Yajnavalkya I-96. 3 and is expressed this :—" A *Nishada* marrying a *Nishadi* produces offspring who in the fifth generation throw of their Sudrahood. The fifth generation can be invested with the holy thread ; and the sixth can perform sacrifices " [I. (8) 13, 14-15]. 4 This rule is restricted to *Nishadas* only and the caste so formed has a special name and does not become any of the three primary twice-born

1. Tesham varnanupurvyena chatasro.
   bharya brahmanasya,
   Tisro rajanyasya.
   Dvevaisyasya.
   Eka Sudrasya.
2. Tasu putrah savarnanantarasu savarnah.
3. Jatyutkarsho yuge jneyah panchame saptame piva.
4. Nishadenanishndlyam apanchamat jatah apahanti sudratam (13) Tam. upanayet shashtham yajayet. (14)
   Saptamo Vikritabijah samabijah sama ityekesham samjnah karmena nipatanti.

* Sajatavuttamo dandah anulomyetu madhyamah Pratilomye vadah pumsam naryah karnadikartanam.

† Tisrah varnanupurvyena dvetathaika yathakarmam Brahmanakshatriyavisam bharya sva sudrajanmanah.

castes. Pro[illegible] attention must be drawn to this as some have understood [illegible]aring the thread as identical with becoming a Brahman.

The Ga[illegible] Dharma Sutras like the Mitakshara recognize six distinct A[illegible]a castes, and six distinct Pratilomaja castes, [illegible]t the names of the castes are not always the [illegible]me in both (IV-16, 17, 18, 19, 20 ,21). *Gautama* denies purificatory [illegible]tes to all Pratilomajas and persons born of Sudra mothers. (IV-[illegible]4, 25). [1] The *Vasishtha* Smriti refers to Pratilomajas as devoid of virtuous qualities and good conduct (XVIII-5) and deprecates the marriage of a Brahman with a black woman (XVIII-13). [2] The *Apastamba* Dharma Sutra prohibits the marriage of any man out of his own caste [II-5 (13) 3.] [3].

Gautama.

Vasishtha.

Apastamba.

1. Pratilomastu dharmahinah (IV-24)
   Sudrayam cha (IV-25.)
2. Krishnavarna yarama
   ramanayayaiva nadharmaya
3. Purvavatyam asamskritayam varnantare cha maithune doshah.

In *Manu Smriti* (Chapter X) as in Yajnavalkya's the four principal castes are composed of the offspring of couples belonging to the same castes joined in holy wedlock (X. 5). In regard to Anulomaja castes a distinction is made (as in Baudhayana) according as the man takes his wife from the next lower class or goes further down. In the former case X. 6.[1] says that the offspring though partaking of the lower nature of the mother should be regarded as of the same status as the father; but Kulluka Bhatta, the commentator, says that they are intermediate in status between the father and the mother. Verses III-43, 44 lay down the same rule as Yajnavalkya's I-62 referred to above; no corresponding rule is found for Pratiloma unions. In sexual offences the death penalty is prescribed for the male offender if he is inferior in caste to the woman (VIII-366).[2]

Manu.

1. Strishvanantarajatasu dvijairutpaditan sutan.
   Sadrisan eva tanahuh matridoshavigarhitan.
2. Uttamam sevamanastu. jaghanyo vadham arhati.

III. ANULOMA AND PRATILOMA UNIONS.

It will thus be obvious that there was no marriage ritual for Pratiloma unions, and that the law-givers looked upon Pratilomaja castes as evil and treated Pratiloma sexual offences as capital offences. It will be wrong to argue that the mention of Pratilomaja castes is proof that the practice of Pratiloma unions once existed.

As has been pointed out by competent critics the classification of society into four main Varnas had become traditional even in the time of the earlier law-give[illegible]he genesis of the mixed castes given in [illegible]tis is an attempt on the part of the Brah[illegible]derive them from the original four Varnas. I believe this i[illegible]rrect explanation of the genesis given of most of the Pratilo[illegible]a castes, for, with the single exception mentioned in the footnote[1] [illegible]ere are no instances of Pratiloma marriages or unions in the wh[illegible]le range of Sanskrit literature. *The disinclination to allow one's womankind to consort with men of lower races seems to be a deep-seated instinct of the human breast.* The Rajputs take Jat wifes but do not give their own girls in marriage to Jats. It is stated that some Maharatta clans take Kunbi wives but not the other way. The marriage of the Negro with the white woman is looked down upon as a social anomaly by the white races of Africa and America. It is well known that the Nair women of Malabar enter into temporary unions with men of other castes, but all such extra caste unions are Anuloma or hypergamous. If the object aimed at be mere improvement of the race there is no doubt that the law-giver should condemn Pratiloma unions in matriarchal communities and encourage Anuloma unions, for it is obvious that the offspring of a woman entering into a Pratiloma union is worse, and that of a woman entering into an Anuloma union better, than the offspring of a Savarna union where the male is of the same caste as the female. The practice of Anuloma unions so very popular in Malabar has thus a scientific basis and has brought about a great improvement in the race. It is stated that Vascode Gama's diary(15th centu ryA.D.) describes the Zamorin of Calicut at the time as a *very dark man* and that a Mahomedan traveller of the same century refers to the fighting people of Malabar *i. e.*, the Nairs, as the blacks of the country. These descriptions have now ceased to be true. Hypergamous unions, of course, necessarily imply polygamy in the higher castes

Fictitious genesis of the so-called mixed castes.

Hypergamous unions suited to matriarchal tribes.

1. The solitary instance referred to above of a Pratiloma marriage in Sanskrit literature is that of Yayati with Devayani, daughter of Sukrachari. Yayati was averse to the union but was prevailed upon by Devayani's father, the Guru of the Asuras. This Asuric instance is not of course for our imitation. The only law book which speaks of marriage rites for Pratiloma union is Ausanasa which appropriately bears the name of this same Asura preceptor; and the only Pratiloma union which even this book recognises is that of a Kshatriya with a Brahman girl. There are one or two cases mentioned in the Vishnu Purana of kings having married the daughters of Brahmans but the mothers of these girls did not belong to the Brahman caste.

and polyandry in the lowest or the Sudra class as was till recently the case in Malabar.

IV. CHANGES IN MARRIAGE LAWS.

Pratiloma marriages never to[illegible]ted by Hindu[illegible]

It may now be [illegible]aken as established that to the extent to which [illegible]e proposed Bill legalises Pratiloma marriages [illegible] will introduce an innovation unrecognised at any time [illegible]sm and will offend against some of the deep-seated pre[illegible]he Hindus. Even as regards Anuloma marriages it is e[illegible] that what the advocates of the Bill contemplate is different from what is described in the Smritis. The Hon'ble Mr. Basu apparently contemplates that when a Brahman marries a Komati or a Sudra woman the offspring of the union should have the status of a Brahman; but none of the Smritis accord such a status to the offspring, and in order to find a parallel to what the social reformers contemplate we must go, as the Hon'ble Sankaran Nair puts it, "from the moderately sacred to the undoubtedly sacred books of the past"—that is, to times when society was yet in a fluid state. It is difficult to distinguish which is myth, which is allegory and which fact, in the literature referred to, but it must be conceded that in some distant and remote past the offspring of Anuloma unions were practically of the same status as the father. The next stage is one in which the offspring of Brahmans by Dwija wives only are stated to have been regarded as Brahmans. A later stage of society with which we are made familiar is that disclosed by Baudhayana [I, (8) 6] and perhaps by Manu (X-6,) already quoted in which the offspring of mixed unions is given the status of the father only when the mother belongs to the next lower class. A fourth stage is that to which Yajnavalkya Smriti is applicable; here the offspring of mixed unions form distinct castes—intermediate in status between the father and the mother according to some, of the same status as the mother according to others. In both these stages there is an under-current of protest against the marriage of Brahmans with black women. To these stages also belong what may be called the breeding up processes under which Nishadas threw off their Sudrahood and the offspring of mixed caste mothers obtain Brahmanhood. Lastly, we have the stage corresponding to Apastamba Dharma which prohibits mixed marriages altogether.

The status of the offspring of Anuloma unions.

Now, what was the cause of this gradual change in the laws? There seems to be little doubt that the change was due to the gradual deterioration of the higher castes consequent on mixed marriages. The Brahmans appear to have begun with wrong notions as to the laws of heredity, and being a patriarchal race they attributed to the father

Mistaken law of Heredity.

the entire share in the production of the offspring. Manu (IX-35, 36)* thinks in one place that the mother has no more part in the production of the offspring than the soil has in the conversion of the seed into the tree. The word Kshetram means both *land* and *wife*. The Vedic saying that the father reproduces himself in the son by means of the wife expresses the same notion. When the community was more or less homogeneous one could take [illegible] m the lower castes without observing any marked physical deterioration in the offspring.

Deterioration of the Higher castes.

When subsequently aboriginal races differing in physical characteristics from the Aryans began to be incorporated in the body politic physical deterioration as compared with the father must have become noticeable in the dark skin and the stunted stature of the offspring, and this must have led to some recognition of the mother's share in reproduction; and hence the restrictive rule that the offspring will be taken into the father's caste only when the mother did not differ much from the father. It is obvious how a further infiltration of aboriginal foreign blood into the lower castes might have accentuated the physical differences among the various castes and led to further restrictions on mixed unions and to the rule that a black woman may be kept as a concubine but not married. And when ultimately, owing to the gradual disappearance of Kshatriyas and Vaisyas, the Brahmans came to be settled in the midst of aboriginies mixed marriages were prohibited altogether.

R. SWAMINATHA AIYAR.

(To be continued.)

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* Iyam bhumhirhi bhutanam sasvati yoniruchyate Nachayoniguṇan kamaschit bijam pushyati pushtishu.

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MARRIAGE IN HINDU LAW.
BEING A CRITICISM OF BASU'S CIVIL MARRIAGE BILL.*

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Anuloma marriages in a patriarchal community must be distinguished from Anuloma unions in a matriarchal tribe. In the former case the offspring inferior to the father is left in the father's house and leads to the gradual deterioration of his father's race. In the latter case the offspring superior to the mother is left in the mother's *Tarwad* and leads to the gradual improvement of the mother's tribe. There is little doubt that the discontinuance of mixed marriages was due to the causes stated above. This is confirmed by the devices adopted from time to time to avoid deterioration of the higher castes. The Baudhayana rule [I. (8) 12-15] by which a Nishada becomes entitled to wear holy thread in the fifth generation must have given rise to many of the various thread wearing castes now existing in the country. The Manava (X. 64)† and the Yajnavalkya (I. 96) rule by which a Nishadi or other mixed caste woman and her female issue continue to marry Brahmans so as ultimately to produce Brahmans shows how the community endeavoured to minimise the taint that would otherwise be introduced by mixed marriages. This law is not a mere figment of the imagination but must have been a living rule at one time as is obvious from certain practices now prevailing in Malabar. In the community of the Koil Tampurans of Travancore the females can form Sambandhams only with Nambudri Brahmans. The same is the case among some Nayar, Samanta and Kshatriya families of British Malabar. The females of the Tampans and Tirumulpads in Travancore can form Sambandhams only with

Anuloma marriages in partiarchal and matriarchal communties.

Peculiar Malabar Customs.

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† Sudrayam brahmanadjatah sreyasachet prajayate
Asreyan sreyasunjatan gachchhati a saptamat yugat.
(Manu X. 64).

Brahmans. The members of almost all the above castes refrain from meat and liquor; the males form Sambandhams outside the caste and their children do not belong to the caste. These customs which have prevailed now for centuries have entitled the above communities to Brahmanhood, but none have received it ostensibly because the Sambandham is not a marriage as required by the Smritis, but really because mixed marriages have come thoroughly discredited and the Brahmans have closed their ranks. This is a sufficient answer to the Hon'ble Mr. Sankaran Nair who says "the Sudra of yesterday becoming a Kshatriya to-day may be a Brahman in the next few years." The Zamorin has not attained even the title to wear holy thread notwithstanding at least four centuries of purification. Whatever "Revenue Officers" may see, or fancy they see, in the north-west and in the north-east borders it is not so easy to rise in caste in places where Hinduism is strong.

V. ARGUMENTS OF REFORMERS.

The following line of argument is the one usually adopted in favour of reform. "At present the High Court Judges did not know the real spirit of the Hindu religion, and when there was an intermarriage between different castes they declared that illegal because it was opposed to custom. They placed custom over the Vedas, the Smiritis, the Shrutis, and Sadachar, though their ancient law-givers Manu and Yajnavalkya, declared that such a marriage was not opposed to religion.*" May it not be pointed out in reply that in the fourth century before Christ about the time of Megasthenes there was no inter-caste marriage. Is not a custom that has been in vogue for at least twenty-two centuries—for a period longer than the age of Christianity and twice as long as that of Muhammadanism—entitled to consideration not only at the hands of judges but also at the hands of the legislator? Next let us see what the Smritis—the law of still earlier times—say. According to Manu and Yajnavalkya whose Smritis have been summarised under Part II, the son of a Brahman by a Vaisya or Sudra wife was not a Brahman; this did not matter much in those days as the Brahman could then have a Brahman wife also for begetting a Brahman son and for perpetuating his family which is a religious duty. But this is not allowed under the present Bill which prohibits bigamy; how then can a Brahman marry a Sudra wife? It might be answered that in still earlier literature there are instances of sons taking the *status* of the father in such unions. True, but this refers to a period when

* Speeches in the Meeting of the Bombay Social Reform Association, held on 30-9-11.

society was in a [illegible]ate and marital relations were very loose.[1] The instances ref[illegible]o are found mixed up with the lower animals. In the Vedas the [illegible]d Svasa[2] means not only *sister* but also *wife*, and the word [illegible] means not only *brother* but also *husband*. What is the st[illegible]ivilization which these indicate? If we are to go from the "[illegible]ely sacred to the really sacred books," as one of the social refo[illegible] puts it we may as well revert to a state of nature.

Custom the basis of Hindu Law.

Again does anybody contend for a moment that Manu and Yajnavalkya laid down rules of their own making which they considered best for the community? They merely recorded the customs prevalent in their days. In the course of natural evolution a community often outgrows an old custom and change of circumstances often necessitate the adoption of new practices. The changes are recorded from time to time in the Smritis; and as all such books are sacred with the Hindus—the older being the more sacred—a reason is usually given for the change so as not to detract from the reverence accorded to ancient writings. Sometimes the old practice is *Kaleivarjam*, sometimes the change is due to a *Sapam*. In all these cases the obstacle to a reversion to the old practice is custom and popular sentiment. What is Sadachar but custom? What is Smriti but a record of customs? It is well recognized that the basis of Hindu law is custom and the social Reformer is not unaware of this; still he attempts to replace existing customs by practices abandoned thousands of years ago on the ground that the latter are recorded in ancient law books.

An unreal argument.

Of course they are recorded in ancient books; it would be surprising if they were not. If it is answered that the reformers are here meeting the orthodox party on their own ground, then the obvious rejoinder is "Have you convinced them? What is the good of approaching Government with an unreal argument.

Arguments based on freedom of conscience.

It is argued by some that many educated Indians have lost faith in the meaningless ceremonies of the Hindu marriage ritual, and that a simple form of civil marriage should be sanctioned by the legislature for the benefit of these and for safeguarding freedom of conscience. It is not known whether anything more is necessary now to constitute a valid marriage than the simple ceremony of *saptapadi*. If there is any doubt on the point let the legislature formally declare

1. [Mahabharata, Adi Parva, Chapter 128.] 2. [R. V. X. 3 (6)].
3. [R. V. IV 1, (?). 1-18, 124 (7)].

the sufficiency of this ceremony or even enact a civil contract; but let not this pretext be made use of to legalise inter-caste marriages which are now illegal and which must necessarily introduce foreign blood into endogamous communities. [illegible] also argued by reformers that Act III of 1872, and the Le[illegible] Act have not yet operated to the detriment of any of the[illegible] religious communities of India and that the apprehensio[illegible]at the present Bill will have greater effect is unfounded. W[illegible]n a man becomes a Christian or a Brahmo the consequent ch[illegible]ges in his belief, etc., effect a complete severance between him and his Hindu relatives, and he leaves the family altogether. Under the present Bill a Brahman marrying a Panchama wife may claim shelter under the family roof and become a source of persecution and annoyance to the other members. Again a Hindu widow can adopt a son to her husband with the consent of her husband's *sapindas* in Madras, and without any such consent in Bombay; and the Panchama widow of a Brahman may by adopting a boy from among her own relations cause endless trouble to her late husband's relatives. Further, the Bill as drafted confers on those married under its provisions a higher status and larger rights of inheritance than Act III of 1872; for, under the Lex Loci Act children of converts can only inherit property which became vested in their parents during the latter's life-time, while children of persons marrying under the Bill can inherit directly from collaterals. It will thus be apparent that the Bill, if it becomes law, will perpetuate incongruous family relations and confer larger rights than those now accorded to Brahmos and converts to Christianity.

VI. RESUME.

The Bill receives no support from Smritis.

The Brahmans constitute a type *suis generis* and they would be justified in opposing a change in the present practice which has existed for over two thousand years even if the ancient law-givers had sanctioned intermarriages. As a fact, however, none of the law-givers sanction Pratiloma marriages; the aversion to this kind of union is an ultimate fact traceable in the last resorts to the desire of the female to have the best mate available. As regards Anuloma marriages it is obvious that even according to Manu and Baudhayana, the most liberal of the law-givers, a Brahman cannot perpetuate his lineage by marrying a Sudra wife and that he must have a Brahman or a Kshatriya wife in addition, to have a Brahman son. It is impossible for a Brahman marrying a Sudra woman under Mr. Basu's Bill to discharge his debt to the Pitris. Mr. Basu's Bill thus receives no support from the ancient law-givers. The proposal to go to the

really sacred books of the past has merely to be looked at closely to be summarily rejected.

The proposed change involves the extinction of the Brahmans.

There is a vast field for social reform without this extreme step which appears to involve in it the extinction of the Brahman as a separate type. The social reformer says that it will be a glorious end to the Brahman caste to find itself lost in the endeavour to unify the various classes of India. It is to be feared that the Brahman must greatly modify his spiritual conceptions and ideals before this can become possible. Meanwhile, the education of the masses, the elevation of the depressed classes, the fusion of the sub-castes, etc., offer a vast field in which the reformer can have the hearty co-operation of the educated Indian; and these are the essential preliminary measures.

Summary.

To put the case concisely, the reform proposed is not, like post-puberty marriage, a desirable reform which is opposed merely on religious grounds. The practice of inter-caste marriages was deliberately given up by the community in consequence of its baneful effects on the higher classes, and its revival will tell most disastrously on the Brahman community. It must inevitably lead to a further deterioration of the Brahmans, physically, mentally and spiritually. It will be many generations before the Brahmans can reconcile themselves to the idea of giving their girls in marriage to Sudras or Panchamas, and if Brahman boys take, in yearly increasing numbers, to Sudra and Panchama wives, the number of unmarried Brahman girls will annually increase; and, as a consequence, polygamy, which is now a rare exception, must become the general rule. The marriages under the Act will be usually against the wishes of the boys' parents and will therefore be without any religious rites unless social reformers and other proselytising agencies kindly provide such rites for them; in any case, marriages will soon lose their sacramental character. Lastly, the Hindu scriptures have never countenanced divorce, and the introduction of this as an element in the marriage relation amongst Hindus must upset many a cherished notion founded on deep religious feeling; it is no answer to this to say that amongst certain late accretions to Hinduism at the bottom of the scale, there is tribal custom countenancing the free separation of husband and wife. The supporters of the Bill cannot argue that instances of marriages contrary to the present customs will be few and far between and that the effect of the proposed legislation on society will be very limited; for,

it is mainly with the object of removing caste barriers that the present legislation has been proposed. The forward party should not therefore be surprised if even educated Indians stand aghast at the magnitude of the social changes involved, and suggest a less ambitious programme which can be carried out without rousing much opposition. Our efforts may for the present be limited to the fusion of sub-castes by legalising intermarriages between sub-castes under each major Varna where, and if, such marriages are really not sanctioned by law.

The conclusions are :—

(1) The proposed legislation is premature and far in advance of the community.

(2) The Bill as drafted confers on those marrying under its provisions a higher status and larger rights of inheritance than Act III of 1872.

(3) If and when it is decided to proceed with the legislation, the orthodox party should secure such modification of the Bill as will ensure that persons taking advantage of the new Law have no more rights than persons now marrying under Act III of 1872, and shall not be entitled to share in the rights and privileges of the caste.

APPENDIX.

[The following which formed Sections V and VII of the original paper are here taken out of the body of the paper and printed separately as less calculated to interrupt the main argument :—

ARE NOT SOUTH INDIAN BRAHMANS ARYANS ?

Deterioration of the higher castes grossly exaggerated by the Social Reformers.

The conclusion which follows from the above discussion is that mixed marriages (Anuloma) were once in vogue and have been definitely abandoned now for many many centuries—it is impossible to say how many – in consequence of the deterioration they produced in the higher castes. The extent of this deterioration is being grossly exaggerated, for political reasons by one class of writers, to pave the way for radical changes in society by another class of writers. The latter class includes a few individuals who chafe at the inferior place which is accorded them in the religio-social scale of Hinduism and would gladly sweep away the

whole fabric. In their radical hatred of existing institutions these welcome every theory which is supposed to show that the higher castes are not so very superior. One of these writing in the "Contemporary Review" of September, 1911, refers to "ethnological investigations which have shown that the features of some of the so-called lower classes have more of the distinctive physical characteristics of the Aryan race than even the higher castes can show and that there is a good deal of foreign and aboriginal blood among the Brahmans and Kshatriyas."

Cephalic and Nasal indices.

The reference is apparently to the investigations of the late Sir H. Risley. It is impossible to deal adequately with this question here, but it may be pointed out that some of Sir H. Risley's conclusions are highly hypothetical and speculative as he himself admits. For instance, while there are long headed and broad headed nations among European Aryans he assumes that only long headed Aryans entered India and it is this assumption mainly that makes him refuse to the Maharatta Brahmans a place in the comity of Aryan races, and to predicate much aboriginal intermixture in the Bengal Brahmans and Kayasthas. Again, he places too great a reliance on the nasal index, overlooking the fact that among many castes, including Brahmans, in Southern India and parts of the Deccan, women wear nose ornaments on both sides of the nose and in the septum; I have reason to believe that boys also wore nose ornaments among some classes in the past. The hourly manipulation of the nose which the wearing of these ornaments involves will, in the course of centuries, broaden the end of the nose and raise the nasal index. These nose ornaments are, I understand, becoming common among the Nair females of the West Coast, although they have not yet been adopted in North Malabar and are worn in South Malabar on one side of the nose only. The Nambudiri Brahmans have a rule that the noses of their women should not be pierced; if this is any indication of the custom that prevailed in the past in Northern India from which the Nambudiris originally came, a large deduction must be made from Sir H. Risley's conclusions based on the nasal index. Sir H. Risley's theory and classification requires further examination as regards the higher castes. The only valid conclusion from his data is that the Bengal Brahmans and Kayasthas and the Mahratta Brahmans are not of the same race as the Gujars, the Jats and the Rajputs. Of course not. The Jats and Gujars are a blend of the Sakas, Yu-chis and the Gujars who came to India, at the lowest computation, two thousand years after the Vedic Aryans.

Risley's theory at variance with other accepted theories and estabilshed facts.

Sir H. Risley holds, and deservedly holds, a high place among the anthropologists of the world, but that is no reason why we should accept without question his guesses and opinions on historical and archæological questions; for example, his assumption that the Jats and the Rajputs of the Punjab, Rajputana and Cashmere are the descendants of the Vedic Aryans. This assumption runs counter to many accepted theories and established facts and Sir H. Risley has been put to the necessity of adopting various devices to explain away the contradictions. Some of these contradictions may be mentioned here: (1) He denies the correctness of the identification of the Jàts with the Getæ of Herodotus. (2) He says that the first batch of Vedic Aryans entered India through what are now the inhospitable deserts in South-Eastern Persia and Baluchistan, and first settled in Sind not in the Punjab. (3) It seems that the Sakas also entered India by the same path. (4) It seems that the caste-system did not originate in India, but was copied by the Hindus from the Persians. (5) It seems that the Yu-chi and other Asiatic tribes who held sway over the Punjab, Rajputana and Cashmere for at least three centuries disappeared without leaving any traces on the population, while the Sakas in Central India and Sourashtra who had but a short-lived influence on the Andhra Kingdom made the people of the Deccan brachycephalous as far as Coorg. Sir. H Risley's assumption that the Sakas were brachycephalic is a wild guess. He appears to have put forward his theory at a time when the historical data in regard to the rule of Yu-chi and allied tribes had not been properly marshalled. The theory is also at variance with the linguistic theory of Dr. Grierson in some material points. Lastly, it may be noted that while the names Khatri and Mina occur in ancient history, Jat and Gujar are not heard of till several centuries after the Christian era. There are also other considerations which show conclusively that the Jats are not Vedic Aryans, but this is not the place to enter into details.

R. SWAMINATHA AIYAR.

(To be continued).

THE JUBILEE OF THE MADRAS HIGH COURT.

On the 15th of August 1912, the Madras High Court attained its Jubilee[1]. Elsewhere, in Calcutta and Bombay the respective High Courts celebrated their Jubilee. The Madras High Court has apparently decided not to take any steps to celebrate its Jubilee. The Calcutta High Court has rightly been regarded by the people of Bengal as the defender of the liberties of the people, and as a bulwark against any oppressive or illegal acts of the Executive Government and notwithstanding individual exceptions, we believe, we are right in stating that the people in this Presidency repose great trust in our High Court. The people in this Presidency though they may think that some amendments of the constitution are necessary consequent upon the change of time and circumstance feel the greatest confidence in the High Court. The words of Sir Arthur Collins, late Chief Justice of the High Court in opening the new High Court Buildings are justly remembered by the people as echoing the spirit of independence which ought to characterize the highest Court in the land. "On behalf of the Judges of the High Court of Judicature, I accept the charge that your Excellency, as representing the Queen-Empress, has been pleased to entrust to me. I do assure your Excellency that His Majesty's Judges will, to the utmost of their ability, endeavour to do their duty in the fear of God and without the fear of man. My Lord, in India the Judges of the High Court have many and difficult duties to perform. * * * My Lord, so long as this High Court is an independent Court, with Judges who fear no man, and who administer the law according to the rules of law, equity and good conscience, with the jurisdiction it has exercised for so many years intact, I believe it will continue to have and to deserve the confidence of the public. * * * I fervently hope that long after you and I, your Excellency, have passed away to that undiscovered country, of which we know so little, there may always continue to be found, men of ability and courage, who will administer the law in these courts without distinction of class, creed or race." We regret that the Acting Chief Justice of the High Court should not have followed the example of the other High Courts in the celebration of the Jubilee. We do not know the reasons weighing with the Judges in this matter but if there was any difficulty as to the mode of celebration we may say that the Bar

1. There seems to be some doubt whether the formal opening was on the 15th or the 16th. In Madras High Court Reports and the Lawrence Asylum Press Almanac for 1863 we find that the High Court opened on the 15th August 1862. It is said, however, the judges sat for the opening of the Court on Saturday, when it should be the 16th August—Ed.

has always been ready to co-operate with the learned Judges in any manner they may have decided upon.

JOTTINGS AND CUTTINGS.

Women in High Judicial Appointments.—The selection of women to fill official appointments in the United States is (says the *Globe*) a quite remarkable feature of the time. Two women have attained judicial positions within the past few weeks. Miss. Mary Bartelme, of Chicago, has been appointed Assistant Judge of the Juvenile Court of Cook County, Illinois, where she will preside over a separate court for the trial of young women and girls indicted for minor offences. Miss. Bartelme is a lawyer of some years' standing, who has already served as 'public Guardian' of Cook County, in which Chicago is situated. The other appointment, that of Miss. Clara Jess, who is now Recorder of Daly City, California, is of especial interest. Miss. Jess is not only the first woman magistrate in California, where the Recorder exercises judiciary powers and presides over the police court, but she is the first woman in the state to unite a couple in matrimony, such a ceremony inaugurating her official duties.—*The Law Journal.*

* * *

"*Alienating Criminal Classes.*—In the Court of Criminal Appeal on Monday Mr. St. John Macdonald, in asking the Court to allow a prisoner's sentence to run from the date of the conviction, remarked that it was not the prisoner's fault that his appeal had not been heard before, but the fault of the Government in not appointing more judges. (Laughter.) Mr. Justice Darling: It is nothing to us if the Government choose to alienate the criminal classes. (Laughter.) 'How would you remedy it?' asked Mr. Justice Channell. 'Oh, many of us would like to be made Judges,' was counsel's retort.—*Ibid.*

The Madras Law Journal.

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MODERN IDEA OF BAIL.

In making an application for bail under Chapter XXXIX of the Code of Criminal Procedure, very few people have now reason to remember that originally it was a case of real bailment of the accused into the custody of the bailee, and that the "bail" or bailee undertook to surrender the person committed to his custody and the condition in the 'bail-piece' was that in certain events on the failure of the bail to render his principal he would incur certain penalty in a sum certain. The original idea was to constitute the bail the gaoler or keeper of the person handed over into his control.

Blackstone, describing the ordinary gaolers as a merciless race of men, and, by being conversant in scenes of misery steeled against any tender sensation (IV 300) speaks of bail as a delivery or bailment of a person to his sureties upon their giving sufficient security for his appearance; he being supposed to continue in their friendly custody instead of going to jail (III 290, IV, 296).

Thus, when the body of the debtor was committed to his bail and subsequently the debtor was convicted for felony and consequently got into the hands of the Sheriff, we find in 2 Strange 1217 (*Machaelmas Term 18 Geo. II*) that the bail was allowed a writ of *Habeas Corpus* upon the Sheriff, so that the condition of the '*bail-piece*' as to delivery by the bail might be satisfied before the convict was sent into transportation. *Fowler* v. *Dunn* [1] was a similar case. There the convict was acutally on board a ship in the River Thames, and Lord Mansfield, having regard to the obvious inconvenience of granting a writ,—refused to grant the motion, remarking if the prayer was granted at that stage a bail as well might pray for a writ to bring up the convict even after actual transportation, for the King's writ will run into the Colonies. In *Trinder* v. *Shirley*[2] where the principal attained the dignity of a peer of the realm, it was held that as a peer he could no longer be kept in the custody of his bail, and therefore the bail was altogether discharged from his liability to render the principal or to pay down the penalty named in the '*bail-piece.*' Similarly when the principal became privileged by being elected a

1. (1767) 4 Burrows 2034.
2. (1778) 1 Douglas 45.

Member of Parliament, the bail was held entitled to have an *exoneretur* entered on the 'bail-piece, (*Langridge* v. *Flood*, 1 Tidd's Practice 293; *Phillips* v. *Wellesly*, 1 D. P. C. 9.)

It is even said that a special bail in the superior Court is entitled at any time to take the principal into his actual physical custody with a view to surrender him in order to obtain a discharge on the 'bail-piece' *Rex.* v. *Hughes*,[1] and a person may lawfully assist a bail in capturing his principal and that a person so assisting does not incur any liability even though the bail does not continue present *Pywell* v. *Stow*.[2] In 2 H. B. 120 a bail was held justified in breaking and entering into the house of a third party in which the principal was residing in order to seek for him with a veiw to surrendering him; and to support the plea of justification, it was not even necessary to aver, that the principal was actually in the house at the time.

In *Ex-parte Gibbons*[3] Lord Chancellor Hardwicke said that in the Court of King's Bench the ordinary bail-piece is, such a one defendant, *traditur inballium super cepi corpus* &c., so that in the constant language of that Court the bail are his gaolers, and it is upon this notion the bail have an authority to take the principal, and he may be arrested on a Sunday, for as he is only at liberty by the permission and indulgence of the bail, they may take him up at any time. To the Attorney-General's argument that it is contrary to the rules of Common law that a witness attending a Court should be arrested on his way thereto, Lord Hardwicke said that he has never known that a bail's taking the principal while on his way to a Court of Justice has ever been treated as a contempt of Court.

That the question of release on bail was really treated as one of bailment in the modern sense, is further apparent from the fact that in *Merrick* v. *Vaucher* [4] where the principal was sent out of the kingdom under the *Alien Bill* 33 Geo. III, C. 4 so that it was impossible for bail to surrender his principal, the question as to the liability of the bail is treated to rest on the principle on which of the two innocent persons the loss should fall, the plaintiff or the bail; and Lord Kenyon decided that the bail to whom no fault or neglect whatever is imputable ought not to suffer.

Blackstone, in a foot note at p. 292 of Vol. III quoting from *Tidd's Practice*, says " Mr. Tidd to whom I have been so much indebted observes that it is curious that the changes which the law of arrest have undergone at different periods. Anciently, as no *capias* lay, an arrest was not allowed except in actions of trespass *vi et armis*; afterwards an arrest was introduced with the *capias* in

1. (1828) 3 C. and p 373.
2. (1811) 3 Taunton 425.
3. (1747) 1 A. and K. 238.
4. (1794) 6 T. R. 50.

other actions; and now an arrest cannot be had in the only action wherein it was formerly allowed." If the law of arrest had undergone such radical change in the days of Blackstone the fundamental conception underlying bail has in modern practice gone through more curious changes. In Hawkins Crown Law (Book II. Ch. XV) bail is described as the "Benefit of Replevin" (Sec. 20) thus implying that the accused was completely under the control of his bail, and when the accused is thus delivered to his friend, the latter executed bonds either in a certain sum or Body for Body, or both ways. But it is added in Sec. 40 that such a recognizance, Body for Body, does not make the bail liable to the same punishment with the prisoner, but only to be fined &c. Hawkins opens his chapter on bail with these pregnant remarks.

Sec. 2. The words Bail and Mainprize are often used promiscuously, and they both agree in this, that they signify the saving a man from the Common Gaol by his friends undertaking for his appearance, &c., and the chief difference between them is this, that a man's mainpernors are barely his sureties, and cannot imprison him themselves to secure his appearance; but a man's bail, are looked upon as his Gaolers of his own chusing, who if they suspect him, may either detain him themselves, and compel him to appear according to the condition of the recognizance, or may bring him before a Justice of Peace, by whom he may be committed unless he find new sureties.

In modern practice the idea of bail has under gone such a radical change that very little of the notion of bailment remains except the word itself, and the modern bail means practically the same as '*Mainprize*' as explained by Hawkins in the passage set forth above The accused enlarged on bail is no longer in a state of semi-servitude under the custody of his sureties, and no longer occupies a station similar to that of *a manicipium* or a *nexian* debtor in Roman Law. In the middle of the 19th century, the notion of the sanctity of personal liberty had undergone such rapid development in England that imprisonment for civil debt was practically abolished by 32 and 33 Vic. C. 62, and we find a corresponding change in the idea of bail in criminal cases. The accused person who is presumed to be innocent till convicted is now "*enlarged*" on bail. The bail bond stipulates only for his personal appearance on specified occasions. The sureties have no longer the power to arrest him nor are they under any liability to surrender him personally. The only condition in a modern bail-bond is that if the principal while at large makes default in appearing, then the sureties forfeit the whole

or a part of the sum of money specified in the bond, but they have no longer to answer Body for Body.

A corresponding change we see in the Indian Statute Law Under Madras Regulation X of 1816 (see Appendix, Form No. 3.). the condition of a bail-bond was that the surety shall *produce* the accused at the time and place stated, and under Section 157 of the 1861 Code of Criminal Procedure (Act XXV of 1861) it is enacted "the surety or sureties shall bind himself or themselves under a special penalty to *produce the person accused* before the Magistrate on or before a fixed day, to answer the complaint."

Here the notion that the surety is the keeper of the person handed over to his custody still lingers though the form of bail-bond prescribed by the same Code is the form then newly adopted in English Practice. But gradually the idea that an accused person is *held to bail* disappears altogether from the 1872 Code and is replaced by the expression that a man is 'enlarged on bail'; and the condition in the bail-bond prescribed by Sec. 499 of the present Code is that the accused shall attend at the time and place mentioned in the bond. The old idea of bailment or handing over has altogether vanished, and under Sec, 500, Criminal Procedure Code when the bond is executed the accused is released or set at liberty from custody. Whenever the Court finds the sureties to be insufficient, it is the Court that has to take steps to rearrest the accused but it has no power, as of old, to call upon the sureties to surrender their principal. Again under Sec. 502, Criminal Procedure Code the surety desires to have a discharge, he has to apply to the Magistrate to issue a warrant to arrest the principal. The surety is absolutely helpless in the matter without the process of the Court and has no manner of personal control over his principal. Though a surety for good behaviour or for keeping the peace under Chapter VIII of the Code is supposed to exercise a certain amount of personal influence over his principal (see Criminal Procedure Code Secs. 112 and 122), yet a surety under Chapter XXXIX is not expected to exercise any manner of personal control over his principal. If the surety proves himself to be solvent to the extent of the sum named in the bond, the Magistrate is bound to accept him and the only condition of the surety's bond (See Form XLII, Sch. V) is that on the principal's making default in appearance at the time and place specified in the bond the surety shall forfeit the whole or any part of the sum named therein, if the court, in the exercise of a sound discretion, decides to enforce the bond.

S. SWAMINADHAN.

MARRIAGE IN HINDU LAW.

BEING A CRITICISM OF BASU'S CIVIL MARRIAGE BILL.*

CONTINUED FROM PAGE 54.

Thurston's Statistics.

Mr. E. Thurston, late of the Madras Museum, published a Bulletin in 1896, containing among other things comparative anthrometrical data for the Brahmans, Kammalans so Pallis and Pariahs, residing in the Madras town. The data for the Brahmans were obtained by taking measurments on forty adult males of the poorer classes, some of them so dark that Mr. Thurston said he would be sorry to acknowledge common Aryanhood with them. I suppose the poorer classes were chosen by Mr. Thurston in order to give the Kammalans, Pallis and Pariahs a chance in the comparison. The individuals selected among the Brahmans were from the following occupation :—Agriculture, Clerk, Guru, Mendicant and Schoolmaster, and the average nasal index arrived at was 76.7 against 71 or 72 arrived at by Sir H. Risley for his assumed typical Aryan—Jat and Rajput. Sir H. Risely has reproduced 76·7 in his Census Report of 1901, as the average nasal index of the poorer Brahmans of the town of Madras but even he hesitates to accept it as it has probably been affected by the inclusion in the group of some tribal " priests who obtained recognition as Brahmans when their votaries insensibly became Hindus." He could not help doubting the correctness of Mr. Thruston's figures as these led to the absurdity that the indigenous tribes had finer noses than the immigrant Brahman. The average of 76·5 given for Patter Brahman in the above Census Report was also furnished by Mr. Thurston ; I do not know whether any selection was made by him in this case also. The above appear to be the only materials on whicn the above writer and others base their speculations on South Indian Brahmans. Mr. Thurston's data are *obviously* and *clearly* not typical.

Very few thread-wearing priests in Southern India.

" There is very little doubt," says the writer referrred to above " that the majority of the Brahmans, at least in Southern India, represent the priestly classes among races long ago assimilated by Hinduism." The only authority for this statement in regard to Southern India is, so far as I am aware, the above remark about tribal priests. Everything that we know of the Malabar and the Tamil country is in direct contradiction of the statement. The Brahmans of Southern India formerly considered the other castes as

*Reprinted with modifications from the Indian Review for October, 1911.

aliens to Hinduism and it is only recently that many non-Brahman castes of the South have come to be regarded as Sudras; this is the explanation why even the sight of a non-Brahman pollutes food here, while it is otherwise in the Deccan and Nothern India. The *Ilayathus* are a small thread-wearing community in Malabar who officiate as priests to the Nayars, but their Makkattayam system of inheritance shows them to be immigrants, and their Gosha system shows them to be late immigrants, into Malabar. The *Ilayathus*, who by the way are not Brahmans, could not therefore have been the original tribal priests of the Nayars and there is apparently no other thread wearing caste in Malabar who act as tribal priests. In the Tamil country it is considered degrading to Brahmans to officiate as priests to non-Brahmans or to accept gifts from them, and the poeple who do so officiate are generally Adisaivas and Telugu Brahmans. The Telugu Brahmans are very recent immigrants and could not have been tribal priests of Tamil castes. The Adisaivas are a small community of temple priests called also Gurukkal, and are not associated with by the other Brahmans; it is not known if these are the tribal priests referred to, but the tradition is that they came from the north in the early centuries of the Christian era. It is understood that in recent years some Tamil Brahmans who are not Adisaivas go to Sudra houses on religious occasions but their number is very limited. The statement quoted above of the writer in the Contemporary Review is thus unsupported by facts or by authority.

Brahmans not wanting in moral courage.

Again, it is insinuated by the writer that the Brahmans though reputed to be foremost in intellectual capacity are sadly wanting in character and moral courage, and would therefore greatly improve by a cross with castes which are physically strenuous and possess high moral stamina. It is well known that since the times of the Upanishads the Brahmans have never set store by merely physical qualities and have devoted their entire attention to the cultivation of their spiritual and intellectual side, but it will be a great mistake to suppose that they are, in consequence, physically less strenuous than other castes. One material factor that goes to undermine the physique of the Indian is the periodical famine during which the population has to live on insufficient food for months together and this weakens the system beyond the limits of perfect recovery; the Brahmans who in times past were never left in want have been free from the effects of these periodical visitations, and one of Mr. Thurston's bulletins shows that the Brahmans compare well with the other castes in regard to weight and stature. The

insinuation tnat the Brahmans are wanting in moral courage is indeed surprising for many of the greatest reformers have been Brahmans both in ancient and modern India. General sweeping remarks in regard to whole communities based on personal dislikes or insufficient information often prove false—as, for instance, the opinion of Macaulay in regard to the Bengalees. The writer who belongs to the West Coast is possibly misled by the peculiar circumstances prevailing in Malabar. The Nambudiris who, be it remembered, entered Malabar as conquerors, have peculiar marriage laws under which all but the eldest son must take to lower caste consorts. The virility and the intellectual acumen of the race as expressed in its jun ior members are thus transmitted to the Sudra caste, the members of which have, in consequence, taken greater advantage of the educational facilities offered by Government than the corresponding castes on the East Coast; and some of them are thought capable of holding their own with the best of the Brahmans. But this is an exceptional case and is altogether insufficient to support a general theory.

No grounds for doubting the Aryan descent of South Indian Brahmans.

This question of ethnology add anthropology has been entered into at some legth here because it has furnished the main argument by which the extremist reformers have attempted to silence their opponents in the present controversy. The extremist reformer argues in effect that the South Indian Brahmans are not, as a rule, racially distinct from the surrounding Dravidian races and that they should again merge into these races now that there is no necessity to have a separate priestly class. The Brahmans do not deny that their ancient Rishis at times married non-Aryan wives; to this extent and to the extent to which the Smritis allowed inter-caste marriage in the past there is foreign blood in the Brahman and in the higher castes. But, so far as can be judged with the evidence available there is absolutely no ground for doubting that the South Indian Brahmans—such of them at least as are not hereditary priests to Sudras —are of Aryan descent.

Brahmans not confined to Sacerdotal functions.

An ancient Sanskrit writer, the high authority Patanjali, has stated that the Brahmans are distinguished from the other castes by their white or whitish yellow colour; this shows that the class was racially distinct from the rest of the population; and Greek writers of and since the time of Alexander the Great have placed it beyond doubt that the Brahmans were always *born* and never made. They were the repositaries of learning, sacred and secular; but

Megasthenes distinctly states that they could follow professions other than sacerdotal. And we learn that in his voyage to the coast down the Indus, Alexander came across a city and colony of Brahmans—called Brahmanabad; the Brahman inhabitants of this city could not all have been priests. We learn from history that the Brahmans have been advisers and counsellors, messengers and officers of Kings and that they have not hesitated to bear arms when necessary—like Drona and Parasuraama of the epic period and the Nambudiris and Mahratta Brahmans of modern history. In the Telugu country the whole of the Niyogi section of Brahmans have been following now for several centuries secular occupations as advisers, generals and officers of Indian Kings and of the British Government. The same has been the case in the Tamil country where members of the same family follow secular or religious pursuits as suits convenience. Sir H. Risley thinks ('People of India,' p. 250) that the occupations followed by the Brahmans were as diverse in the time of Manu as they are now. In all cases of Brahmans secularly engaged a ritual is prescribed which is shorter and less engrossing than that adopted by the Brahmans whose whole time is spent in devotion and study. These facts in the history of the Brahman caste are emphesized here because thay completely disprove the astounding statements made in in the article referred so above in the "Contemporary Review," August 1911 that since the advent of the British Government in India "the Brahmans have had to face the humiliation of seeing the other classes taking possession of fields from which their religion jealously excluded them" and "yearned to follow professions and accept Government service;" and "the very occupations which they now began to embrace would have rendered them outcastes in ancient Hindu Society." Everybody knows that it was the Brahmans who were the first to follow the learned professions in the British regime and to enter State service; it was the same in ancient India, Puranic India and modern pre-British India. If the Brahman caste was originally an occupational one the consequences imagined by the writer would have followed. But the caste was racial in its inception and has always remained so.

THE ARGUMENT IN THE ARTICLES IN THE CONTEMPORARY REVIEW.

The case for reform as stated in the articles in the *Contemporary Review* for August and September 1911 may be considered here. The articles are so full of false sociology, perverse readings of history and envenomed attacks on particular classes of society that it is impossible to deal adequately with them in this connexion.

The main argument is that under the present individualistic regime which allows every person to pursue any calling at pleasure it is no more necessary to divide the population into separate compartments, and that the time has come to abolish the caste system. The writer therefore thinks that the restrictions on marriages where such restrictions are due to the supposed religious inferiority of some of the castes must be removed. This proceeds on the assumption that caste is occupational. As has alreday been pointed out the Brahman caste was racial in origin, and to this has now been added intellectual and spiritual development, the result of a continuous cultivation, for twenty-five centuries which of itself is sufficient to induce a cleavage even in a homogeneous community. The Brahmans may desire to keep their stock pure without assigning any religious inferiority to the other castes. This is a legitimate desire and the right is claimed and exercised by Europeans settled in Africa and America. Does the radical reformer deny it to the Brahman? The individualistic regime has been in existence now for many centuries in all communities.

Some of the other proposals in the above articles are equally objectionable.

(1) *Prohibition of Polygamy.*—It has already been pointed out that polygamy is a necessary consequence of the system of hypergamous unions prevalent in Malabar, and it will be presently pointed out that if Mr. Basu's Bill becomes law, polygamy must become common among Brahmans. The proposal to prohibit polygamy while legalising inter-caste marriages illustrates how radical reformers do not stop to consider the effect of their proposals on the complicated structure of society.

(2). *The right of excommunication should not be recognized by Civil Courts.*—How else can an endogamous community keep itself pure?

(3) *The marriage of girls below a certain age, should be declared illegal.* The Jats are a warlike, turbulent race in the north-west of India who number over four millions, and the unrest caused among them not many years ago by an injudicious agrarian legislation occasioned much anxiety to the Government of India which had ultimately to veto the legislation. When it is remembered that the Jats in many places marry their girls between five and eight years of age one can realize what dangerous guides these extremist reformers are in legislative and administrative matters.

R. SWAMINATHA AIYAR, B.A.

(Concluded.)

NOTES OF INDIAN CASES.

Chunni Lal *v.* **Sita Ram.**—I, L. R. 34 A. 8.—We can hardly understand the decision in this case. The last owner died leaving a widow who succeeded to the estate. Prior to her death she adopted the defendant and after her death the adopted son obtained mutation of registry in his name. Within 12 years from the date of the death of the widow but after the expiry of six years from the date of adoption the plaintiff who claimed to be the next heir to the husband on the death of the widow sued for possession on the ground that the adoption was invalid. He incidentally prayed for a declaration that the adoption was invalid. The Courts below held that he was entitled to possession on the ground that the adoption was invalid and gave him a decree for possession although they held that he was not entitled to the declaration as the suit was brought more than six years after. He did not appeal from the refusal to give him a declaration while the defendant appealed on the ground that the plaintiff being precluded from getting a declaration he was not entitled to possession. After the decision of the Privy Council in *Thakur Tirbuwan Bahadur Singh* v. *Rajah Rameshar Baksh Singh,*[1] one would have thought the question unarguable. See also *Velaga Mangamma* v. *Veerayya,*[2] *Karnam Rama Rao* v. *Venkoba Row*[3]. Even before the decision of the Privy Council in *Thakur Tirbuwan Singh's case*[1] the trend of decisions in Allahabad have been to the effect that articles 118 and 119 of the Limitation Act do not apply to a suit for possession. See *Lali* v. *Muntidas,*[4] and *Chandania* v. *Salig Ram,*[5] where all the cases are collected. The learned Judges in the case under notice seem to distinguish those cases on the ground that in none of them was there a dismissal of suit for a declaration of the invalidity of adoption as in the case before them; but we however fail to see how this can form any real distinction. A suit for declaration may be barred under article 118 or 119 after the lapse of six years and a suit for such declaration brought after that period will be dismissed on that ground but if the suit is for possession of immoveable property the rule as to six years will not apply and such a suit cannot be held barred, because a suit for declaration is barred or has been dismissed as barred. In a case where the plaintiff entitled for possession sues for possession he will be entitled to possession if he has brought the suit within twelve years notwithstanding that if he brought a suit for declaration his suit may be dismissed. Here in this case the plaintiff was entitled to possession

1. (1906) I. L. R. 28 A. 727 (P.C.)
2. (1907) I. L. R. 30 M. 308.
3. (1907) 17 M. L. J. 28.
4. (1901) I. L. R. 24 A. 195.
5. (1903) I. L. R. 26 A. 40.

within 12 years from the widow's death and the fact that he was held not entitled to a declaration which itself we think could hardly be sustainable[Cf. *Deokali Koer* v. *Kedar Nath*,[1]] could not bar his claim for possession. We fail see why the plaintiff should avoid the adoption or sue to set aside the adoption before suing to recover possession. We are glad that the recent decision of the Judicial Committee in *Muhammad Umarkhan* v. *Muhammad Niaguddin Khan*[2], has removed any doubts that may have existed as to the scope of the decision in *Thakur Tirbhuwan Bahadur Singh* v. *Rajah Rameshar Baksh Singh.*[3] .

Mohsin Ali *v.* **Masum Ali.**—I. L. R. 34 A. 20. We have no doubt that the decision in this case as to the construction of the proviso enacted in Cl. 2 of S. 48 C. P. C. *viz.*, that the bar to execution is removed for a further period of twelve years from the time when the judgment debtor prevented the execution by fraud or force is correct. A similar view has been taken by Mr. Justice Sundara Aiyar in *Abdul Kadir* v. *Shaiva Rowthar.*[4] The other questions raised and decided in the Madras case will be discussed later on.

Rangam Lal *v.* **Jhandu.**—I. L. R. 34A. 32. There has been some misapprehension among judges and others that the effect of order XLI. r. 33 is to give unfettered powers to appellate Courts and in the exercise of such powers Courts are untrammelled by the provisions of the Limitation Act and the other provisions of the Legislature. We think the decision in this case gives a considerable *quietus* to any such apprehensions. The decision of the Court of Appeal in *Attorney-General* v. *Simpson*,[5] is a further illustration of the class of cases coming under the scope of the rule.

Jit Singh v. **Maharaj Singh.** I. L. R. 34 A. 57. The Judgment in this case though short is of considerable importance. It was decided in this case that it was not usual to allow a point to be raised before the Privy Council when the same was not raised before the lower court and when there was no discussion there. The point that was sought to be raised was a pure question of law arising upon the pleadings. If such a point was not allowed to be raised for the first time before the Judicial Committee it will be a question whether the High Court in Second Appeal could allow such questions to be raised before them. The practice hitherto has been to allow questions to be raised in second appeal if the same are pure ques-

1. (1912) I. L. R. 39 C. 704.
2. (1911) 22 M. L. J. 240.
3. (1906) I. L. R. 28 A. 727 (P.C.)
4. (1911) 22 M. L. J. at p. 39.
5. (1901) 2 Ch. D, 67.

tions of law although it must be admitted that there is not any uniform course of decisions even on this question of practice. In an earlier case *Gajapathi Radhika* v. *Vasudev Santa Singan*[1] before the Privy Council some distinction is apparently drawn between the practice of the Judicial Committee and other appellate courts. In that case the Judicial Committee observed: "Mr. Mayne has urged that the question he submitted is one of pure law, which he says this committee may decide upon the facts found by the courts below. No doubt there are cases in which the court of appeal will entertain questions of law not argued below, but which are raised by the facts stated in the pleadings. It is impossible to lay down any precise rule for such cases. But Mr. Mayne could not, after time for search, find any case in which this committee had allowed a plaintiff to rest his appeal upon an alleged theory never presented to the courts below and rested on a state of facts inconsistent with the facts on which he had previously rested his case." They then referred to the Judgment of the Judicial Committee in *Sreemutty Dossee v. Ranee Lalunmonee*[2] and state that it would be difficult to say that the question was one of pure law not involving questions of fact to be ascertained, that even if it was a question of law it was a question of law peculiar to the province from which the appeal came for which they should have the assistance of the Indian Courts, that although the appellant might have an amendment if an application had been made to the High Court she should not have such indulgence under the circumstances from the Judicial Committee. We do not think it was intended by the Judicial Committee by the decision of the case under notice to depart from the principles laid down by them in the earlier cases.

Emperor v. **Naushe Ali Khan.** I. L. R. 34 A. 89. We think that the principle applied by Mr. Justice Chamier in this case is the only correct conclusion to be arrived at upon the construction of the definition of theft under the Indian Penal Code. Under the Code it is not necessary that there should be any intention on the part of the taker to deprive the owner of the property permanently or that there should be any intention on the part of the taker to appropriate the property to his own use. That might be necessary to constitute the offence of larceny under the English Common Law. All that is necessary under the code however is that there should be a dishonest intention i.e., intention to cause wrongful gain to one person or wrongful loss to another. When therefore the property was taken or snatched away in order to get the boy from whom it

1. (1892) I. L. R. 15 M. 503 (P. C.) 2. (1868) 12. M. I. A. 470.

was snatched with the object of taking him to his home to commit an unnatural offence upon him, the offence of theft was committed under the code.

Emperor v. Abdul Wahid Khan.—I. L. R. 34 A. 93. We cannot agree with the decision of the learned Judge in this case that the evidence is inadmissible. Evidence of other but similar acts will not be admissible to prove the truth of the act with which a person is charged but will be admissible to show when the act charged in the indictment is proved that the act was done dishonestly. If the lower Court had admitted the evidence of similar acts for establishing the truth of the offence charged then the decision in the case would be right. A reference is made to the decision of the Calcutta Court in *Empress* v. *M. J. Vyapoory Mudaliar.*[1] It will be found that the Judgment of Mr. Justice Mitter in that case proceeds upon a different line of reasoning than that of Garth C.J. Garth C.J. apparently held that evidence of similar acts of bribery was not at all admissible but that was not the view adopted by Mr. Justice Mitter. The view of Mr. Justice Mitter is in accordance with the decision of the other Courts and those of the Judicial Committee and the recent decisions of English Courts. See *R.* v. *Parbhudas,*[2] *R.* v. *Fakirappa,*[3] *R.* v. *Vajiram,*[4] *Mathen* v. *Attorney-General*[5] and *R.* v. *Bond*[6].

Abdulla v. Ramlal,—I.L.R. 34 A. 129. In this case the learned Judges make a distinction between gifts and other alienations. We do not think that the principle laid down by the Privy Council in the case of *Bajrangi Singh* v. *Manokarnika Baksh Singh.*[7] justify any such distinction. The learned Judges refer to a previous decision of the Allahabad Court in *Bakhtawar* v. *Bhagwana,*[8] which held that the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*[7] applied only to transfers for consideration and did not apply to a case of gift. The learned Judges in *Bakhtawar's case*[8] seem to think that the rule in *Ramphal Rai* v. *Tulakuari*[9] has not been overruled but has been left untouched by the Judicial Committee. We do not think that the learned judges are right in this view. After stating that the principle as regards widow's powers to alienate her husband's estate was that laid down by the Judicial Committee in *Collector of Masulipatam* v. *Cvay Venkata Narayanappa*[10] [*viz.* " For religious or charitable purposes or those

1. (1881) I. L. R. 6 C. 655.
2. (1874) 11 Bom. H. C. 90.
3. (1890) I. L. R. 15 B. 502.
4. (1892) I. L. R. 16 B. 414.
5. (1894) A. C. 57.
6. (1906) 2 K. B. 389.
7. (1907) I. L. R. 30 A. 1.
8. (1910) I. L. R. 32 A. 176.
9. (1883) I. L. R. 6 A. 116.
10. (1861) 8. M I.A. 529 at p. 551.

which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that *an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred,*"] and after stating that upon the practical application of the principle there was a difference of opinion in the Indian Courts they refer again to the view taken by the Allahabad Court and state: "The High Court of Allahabad, indeed does not recognise the validity of surrenders in favour, or alienations with the consent of presumptive reversioners, so as to defeat the title of the actual reversioners at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lordships have not been referred to any cases in the province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits they cannot adopt the further limitation which the Allahabad High Court has sought to establish". From these passages it is clear that the principle laid down by the Allahabad High Court in *Ramphal Rai* v. *Tulakuari*[1] has been expressly overruled by the Judicial Committee and if this view is correct it must now be taken to be the settled law as laid down by the Judicial Committee that surrenders in favour or alienations with the consent of presumptive reversioners are valid. No distinction need be drawn between alienations for consideration and alienations for no consideration. In *Ramphal Rai's Case*[1] no such distinction was drawn by the Allahabad High Court and the decision did not proceed upon any such distinction. The decisions proceed upon a general principle which has not been accepted by the Privy Council. We think the sound principle is that laid down by the Madras High Court in the recent case of *Venkatasubbier* v. *Chinnasamier.*[2] In the Bombay case referred to by the learned Judges the Bombay High Court held that the operation of the rule laid down in *Bajrangi Singh's case* "must ordinarily be limited to transfers for consideration, and cannot appropriately be extended to voluntary transfers by way of gift, where there is no room for the theory of legal necessity". Referring to a prior decision of the same court in *Vinayakh* v. *Govind*[3] the learned Judges say that that is referred to with approval by the Judicial Committee in *Bajrangi Singh's case*

1. (1883) I. L. R. 6 A. 116. 2. (1911) 22 M. L. J. 488.
3. (1909) I. L. R. 24 B. 165.

That, however is not the strictly correct view to be taken. The Judicial Committee say that on the practical application of the general principle there has been difference of opinion in the Indian Courts and they refer to the various decisions. The principle applicable in that case was that an alienation made by a widow which would not otherwise be legitimate (as not being made for necessity) might become so if made with the consent of her husband's kindred. That is not based upon any theory of legal necessity and in *Vinayak* v. *Govind*[1] it cannot be said that the learned Judges put the question of consent as evidence of necessity. However that may be there seems to be no justification for restricting the principle to transfers for consideration. In the Bombay case *Pilu* v. *Balagi*[2]. The alienation was sought to be supported on the principle surrender or relinquishment but the Bombay Judges do not give effect to it on the ground that the surrender was only for part of an estate and not for the whole of it. Whether that can be supported and whether that view finds support from the Judicial Committee in *Behari Lal* v. *Madho Lal*[3] need not be considered. The question apparently arose in *Kajah Dev* v. *Umed Singh*[4], but the learned Judges state that no question of acceleration arose in that case on the ground that the donee was not the next reversioner. The donee here was the next reversioner absolutely entitled but however as the learned Judges say that the question did not arise the matter must be left there.

Moss Steamship Company, Ltd., v. Whinney (1912): A. C. 254—

Company—Appointment of receiver for debenture holders—Contract to carry goods at the instance of receiver.—Whether receiver could create a lein on goods carried, for unpaid freights before appointment of receiver.

The plaintiff who was appointed as Receiver and manager of Ind Coope Company, Ltd., in a debenture holder's action, instructed the defendant Steamship Company by a letter written after his appointment which he signed as Receiver and Manager, Ind Coope Company, Ltd., to carry goods to his own address at a distant station under a bill of lading which somehow was drafted exactly in terms as before the plaintiffs' appointments, *viz.*, that the defendants (who were usually carrying the goods of Ind Coope Company, Ltd.) were to be paid not only the freight due for carrying the goods then but were to have a lien on the goods then carried for all previous unpaid freights. The defendants who carried the goods under such a letter

1. (1900) I. L. R. 24 B. 165.
2. (1900) I. L. R. 25 B. 129.
3. (1891) I. L. R. 19 C. 236.
4. (1911)) I. L. R. 34 A. 8.

and bill of lading having claimed not only the freights, of the goods then carried but also a lien for freight unpaid due from the company before the appointment of the plaintiff as receiver, the plaintiff paid the whole amount under protest and claimed a refund in the present action as regards the unpaid freights.

Held (Lords *Shaw and Mersey* dissenting) that the defendants were not entitled to the lien for freights due by the company in as much as plaintiff and not the company was both the shipper and the consignee and that notice of this fact was given to the defendants by the letter of instruction which the plaintiff signed as Receiver and Manager.

Held by Lord *Atkinson* on further ground that the plaintiff's creation of a lien for amounts due by the company was beyond his powers as Receiver and Manager on behalf of debenture holders.

Held by Lords *Shaw and Mersey*, that the plaintiff was entitled to create the lien as the company did not cease exist and as regards outsiders he was for all practical purposes the owner of the goods entitled to create a lien thereon under such terms as may seem to him reasonable in the discharge of his duties.

Khoo Sit Hoh *v* Lim Thean Tong. [1912]: A. C. 323. (P. C.)

Oral evidence—Opinion of trial Judge, weight to be given to—Duty of Appellate Court.

If in a case depending upon oral evidence there is clear perjury on one side or the other, a Court of Appeal must of necessity be greatly influenced by the opinion of the trial Judge who sees the demeanor of the witnesses and can estimate their intelligence, position and character, more especially when they have to act upon his notes of evidence which may not contain or may imperfectly contain points which have been elucidated to the Judge's satisfaction at the trial either by his own question or by the explanations of Counsel given in presence of parties, unless he has clearly failed to take account of material circumstances or indisputable facts or has given credence to testimony which is substantially inconsistent in itself. Except in rare cases of such character, cases which are susceptible of being dealt with wholly by argument, a court of appeal will hesitate long before it disturbs the finding of a trial Judge based upon oral testimony.

In the matter of Taylor. [1912]: A. C. 346 (P. C.)

Barrister—Suspension of, for irregularities without fraud.

A legal practitioner does not in the absence of any fraud commit a contempt of a civil court by procuring a warrant of arrest from a Criminal Court after the Civil Court has refused the same. However irregular the action might be, it is no forgery to substitute without any intention to defraud any body, the name of any witness *bona fide* required, for that of another in a subpœna issued under the hand and seal of an officer of a court.

Their Lordships of the Privy Council while confirming the fine of £ 20 imposed upon the Barrister by the Lower Court for his irregular conduct in substituting the name held that neither the so-called contempt of court nor the substitution was in the absence of fraud any good ground for suspension or removal.

Webster v. Botanquet. (1912): A. C. 394 (P. C.)

Damages—Breach of Contract—Liquidated Damages or Penalty—Construction of Contract.

A contract of dissolution of partnership provided among other things for payment of £ 500 as liquidated damages and not as a penalty in case of the breach of the any of covenants contained therein, some of which related to a right of pre-emption, as regards sales of certain goods by one of the partners, the defendant. The defendant having sold some large quantities to a stranger:

Held in action claiming the £ 500 for breach of covenant, that the £ 500 was only liquidated damages and not a penalty.

Per Cur:—Whatever be the expression used in the contract in describing the payments, the question must always be whether the construction (of liquidated damages) contended for renders the agreement unconscionable and extravagant and one which no court ought to allow to be enforced under the particular facts and circumstances of the case. You are to consider whether it is extravagant or exorbitant or unconscionable at the time when the stipulation is made that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract. Whenever it is impossible to foresee the extent of the injury which might be sustained in case of breach and whenever the damages though very real may be difficult of proof and the proof may entail considerable expense courts have regarded the sums fixed as liquidated damages and not as a penalty if they are not unconscionable or extravagant.

Dunne v. Byrne. (1912) : A. C. 407 (P. C.)

Will—Construction—Bequest for "the good of religion"—Void.

Held that the following bequest was void as being indefinite and not being one "for religious purposes" and that therefore it was not a good charitable bequest. "I will and bequeath that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

Per Cur.—The existence of an overriding charitable intention is not sufficient to supply the lack of certainty. A thing may be conducive or most conducive for the good of religion in a particular district without being charitable in the sense which the court attaches to the word, indeed without being in itself in any sense religious. If the property might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute.

In re **Robinson's Settlement : Gant** *v.* **Hobbs.**

[1912] 1 Ch. 717.

Illegality—Absence of reference in pleading by one of the defendants—Order XIX of 15, effect of—Covenant as trustee—Personal liability excluded.

A transaction which is bad under the Money-Lender's Act because the lender had not registered himself is not only void but illegal as well and an action for money had and received is not maintainable in respect of such a transaction.

One of the defendants in the case had not pleaded that the transaction was bad under the act though the others had. It was argued that at least he could be made liable. But the court of appeal refused to give effect to this argument. The Master of the Rolls held that the transaction being illegal it was unnecessary to plead it. As Lindley, L. J. observed in *Scott* v. *Brown, Doring, Menab & Co.*[1] "No Court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether

1. (1892) 2 Q. B. 724.

the defendant has pleaded the illegality or whether he has not." Apart from this, Fletcher Moulton, L. J. held that order XIX of 15 is only a rule "meant to assist the administration of the judicial function of the Court and not meant to introduce rigid technicalities which would militate against full justice being done by the Court.......Where there is no wrong done and nobody is taken by surprise or put at a disadvantage thereby, it is perfectly open to the Court to grant an amendment or to decline to enforce a strict obedience to these rules, more especially in the case of rules to the breach of which no penalty is fixed." "In this case, no formal waiver of the point would be binding because the transaction was illegal. But even in the case of any other defence, not putting it in the pleading is not a waiver although it does prevent the defendant from raising it unless the Court allows him to amend which it will do only if the raising of it would not be unfair" or as Buckley, L. J. observed. "Not pleading in time leaves the party in mercy and the Court will deal with him as is just."

A further point is noticed by Buckley, L. J. His Lordship relying upon *Miner* v. *City of Glasgow Bank*[1] and *Gordon* v. *Campbell*,[2] holds that upon a covenant by trustee that they will make a payment as trustees and not personally their liability is limited to the trust estate. In this His Lordship differs from Warrington, J. who held that the limitation was repugnant and void.

Manks *v.* Whitely: [1912] 1 Ch. 735.

Merger of charges—Ignorance by Vendee of a second mortgage—Effect of—Toulmin v. *Steere, considered.*

This was a case in which the doctrine of merger of charges came under review before the Court of Appeal. The transactions were as follow. There was first a mortgage and then a second mortgage. The mortgagor and sold the land to a lady who procured the money to pay off the first mortgagee by promising to mortgage the land. The same solicitor acted for all the parties. The intended mortgagee paid the money to the solicitor and the solicitor paid it to the original mortgagor. The first mortgagee was made to reconvey the land to the mortgagor—then the mortgagor to the lady, then the lady mortgaged the land to the lender of the money. All this was arranged by 3 contemporaneous deeds. All the parties except the vendor were unaware of the second mortgage. On these facts, the second mortgagee's contention was that there was a merger of the first mortgage and that he became the first

1. (1879) 4 App. Cases 337. 2. (1892) 1 Bell, App. 428.

mortgagee. Parker, J. held, that there was no such merger in (1911) 2 Ch. 448. The majority of the Court of Appeal, however, felt bound by *Toulmin* v. *Steere*[1] and held that there was a merger and the second mortgagee became the first. The Master of the Rolls states the general principles on this head of the law thus: When a mortgagee receives a payment of his debt the legal consequences vary according to the situation of the parties and other circumstances. If the payer is a stranger and nothing more happens he stands in the place of the mortgagee and is equitably entitled to the debt and can claim to have a transfer of the mortgage. If the payer is himself the mortgagor, the debt cannot be kept alive by him against his own subsequent incumbrancer. The payment off enures for the benefit of the subsequent incumbrancer. If the payer is tenant for life of the mortgaged estate, there is a presumption that he intends to keep the charge alive for his own benefit, whatever the form of the transaction may be. To rebut this presumption there must be clear evidence of actual intention to merge the charge for the benefit of the inheritance. If the payer is owner in fee of the mortgaged estate and the debt is not his own debt, the presumption is that he does not intend to keep the charge alive for his own benefit. To rebut this presumption there must be clear evidence of actual intention to keep it alive. If the owner of the equity of redemption sells the estate with the concurrence of the mortgagee, the purchaser can keep the charge alive even though the owner could not. But according to *Toulmin* v. *Steere*[1] there is a presumption that the purchaser does not intend to keep it. His Lordship also held that the absence of notice of the second mortgage was rather an argument for than against merger. Buckley J. held similarly. Fletcher Moulton, L. J. on the other hand was prepared on the facts to infer an intention on the part of the lender to have for his mortgage land free of incumbrance —free of the second mortgage if such should exist, consequently an intention to keep the first mortgage alive. Even if the intention was not clear as it was for his benefit that the charge should be kept alive and there was no intention to make a gift in favour of the second mortgagee, he would uphold his right to stand in the shoes of the first mortgagee. He was of opinion also that *Toulmin* v. *Steere*[1] was bad law and ought to be overruled.

In re **Pyke: Burnstingl** *v.* **Burnstingl**: [1912] I. Ch. 770.

Covenant to repair—Damages for breach—corpus or income.

A testator died leaving an estate subject to a lease with a covenant by the tenant to repair. The tenant failing to repair, the trus-

1. (1813) 3 Mer. 210.

tees sued for damages and recovered £900. Question was whether this amount should go to persons entitled to the income of the testator's estate or formed part of the corpus of the residuary estate. Warrington, J. held that the latter was the correct position and that the amount was subject to the trusts to which the corpus was subject.

Public Trustee *v.* Lawrence: [1912] 1 Ch. 789.

Conveyancing Act, S. 18 Cls. 11 and 14—Effect of—Mortgage—Construction—" Intention to the contrary."

A mortgage gave to the mortgagor in addition to the power given by the Conveyancing Act the power to lease for 1000 years provided the counterpart was duly delivered to the mortgagor within a month of its execution. Sec. 18, Sub-sec. 11 of the Conveyancing Act contains a similar provision as to delivery of counterpart in cases of leases authorised by the Act but says that the lessee need not see to its compliance. Sub-sec. 14 provides that the further powers of leasing conferred by the deed shall be exercisable with all the like incidents, effects and consequences unless a contrary intention was expressed in the mortgage deed. *Held*: that Sub-sec. 11 applied and the tenant was not bound to see that the counter part was delivered within a month.

Smith *v.* Macnally [1912]: 1 Ch. 816.

Master and Servant—Person holding statutory position—Difference between—Ground of dismissal, must exist.

There is a difference between the position of a servant who has contracted with his master that he shall not be dismissed except upon certain conditions and a person who is entitled to a statutory position which can be terminated only under specific conditions. In the former case, the servant is only entitled to damages if improperly dismissed while in the latter, the person entitled to the position and status can sue for injunction against the authority's interfering with his perfoming the duties in connection with his position or status. When the authority is authorised to dismiss for a particular ground, not only should they consider that there is a ground for dismissal but also there must in fact, be such a ground.

In re **Leeming : Turner *v.*Leeming:** [1912] 1 Ch. 828.

Will—Legacy—Ademption.

A testator had 10, 4*l.* fully paid shares in a company between the date of the will and his death, the company went into liquidation

for the purpose of reconstruction and in lieu of the old shares, he was allotted at the rate of 2 five pound fully paid preference shares and 2 five pound fully paid ordinary shares for every 4 pound share that he had. *Held* that the legatee of his ten shares got the shares allotted in stead and there was no ademption.

Rakusen *v.* Ellis, Munday and Clarke. [1912] 1 Ch. 831 (C. A.)

Solicitor and Client—Duty not to appear in a matter in which he is consulted against his former client, if absolute.

There is an absolute duty on the Solicitor not to disclose confidential communications made to him by his client. But there is no absolute rule that when a Solicitor has acted for a client in a particular matter he or his partners cannot act against that client in anything relating to that matter. There is no law that because a solicitor has acted for a person, he may not afterwards act against him in the same matter. The rule is that where there is such a probability of mischief that the court feels that in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life it ought to interfere and say that a solicitor shall not act, the solicitor will be restrained from acting and not otherwise.

In this case, the defendants were a firm of solicitors consisting of 2 members. The plaintiff had consulted one of them with reference to a contemplated action for his wrongful dismissal by a company. The other partner was away at the time and altogether unaware of the consultation. The plaintiff had his action instituted by another solicitor and the matter was referred to arbitration. The question was whether the plaintiff could restrain the other partner from appearing for the company. Warrington, J. held he could. But the Court of Appeal held he could not as there was no likelihood on the facts of the case of any mischief resulting to him by the defendants employing the other partner.

In re **Atkinson and Horsell's Contract**: [1912] 2 Ch. 1 (C. A.)

Vendor and Purchaser—Possessory title—under Statute of Limitation of nature of—Title commencing with document, promised—If sufficient compliance.

A purchaser under a contract of sale can be compelled to take a title under the Statute of Limitation. The majority of the Court of Appeal held that he could be compelled to do so even when the contract says that the vendor is to give a title commencing with a

certain instrument ; the use of the previous history being to repel any suggestion of disability on the part of any person whose title is said to be extinguished under the Act. Fletcher Moultan, L. J., however was of opinion that when a party undertakes to make out a particular form of title, one commencing under a particular document, it is not open to him to compel the purchaser to take a possessory title however good it might be under the law.

Discussing the nature of title under the Statute, the Master of the Rolls says "the phrase " statutory conveyance " is a loose metaphorical term......the true view is this, that whenever you find a person in possession of property, that possession is *prima facie* evidence of ownership in fee and that *prima facie* evidence become absolute when once you have extinguished the right of every other person to challenge it."

In re Counolly Brothers, Limited ; Wood *v* The Company : [1912] 2Ch. 25 (C. A.)

Debenture holders—Priority—charge holder for money lent for purchase of land.

A company issued debentures creating a floating charge upon their undertaking, one of the conditions being that they should not be at liberty to create any charge having priority over the debentures. The company purchased some land, borrowing money for the purpose and promising to give the lender security upon the land purchased. The question was whether the charge of the lender had priority over that of the debenture holders. Both Warrington J. and the Court of Appeal held he had. The substance of the transaction was that the company acquired only the equity of redemption and not the entire property free of the charge for the *purchase money.*

In re An application of R. J. Lea, Limited for Registration of a Trade Mark : [1912] 2 Ch. 33

Trade Marks—Surname—not calculated to adapt or distinguish.

A mere surname of an individual though it may be adapted to distinguish the goods of all the persons taken collectively who bear that surname from the goods of other persons bearing a different surname is not adapted to distinguish the goods of the applicant from those of other persons within the meaning of the Trade Marks Act.

Rudd v. Bowles: [1912] 2 Ch. 60.

Deed—Alteration of date by consent—Speaks from what date.

In this case Neville, J. had to consider the effect of an alteration in the date of execution of a lease deed by mutual consent and thus states his Lordship his view of the law. "Such an alteration could not operate to revest an estate which had already passed under the deed in its original form ; but I see no reason why such an alteration should not avail to define the intention of the parties in the first instance in amplification of the grant and I cannot but think that the lessor is estopped from shewing that the date inserted by himself is not the date from which the demise operated, so as to prevent any one claiming under the lease from relying upon the circumstances existing at the date which the lease bears" The circumstances existing at the date of the original execution were not sufficient to raise an inference of implied grant of way; at the later date, they were perfectly clear and sufficient to raise the inference. His Lordship held that the circumstances existing at the later date might well be looked at for the purpose of determining the scope of the grant.

Great General Railway Company v. Balby with—Hexthospe Urbon Council: [1912] 2 Ch. 110.

Dedication—Railway Company—Cannot dedicate a right of way across its lines.

A Railway Company cannot grant to the public a perpetual right of way across its lines. What it cannot grant it cannot dedicate and no amount of user on the part of the public will give rise to a public right of way.

Northern Assurance Company, Limited v. Farnham United Breweries, Limited: [1912] 2 Ch. 125.

Modification, meaning of— Debenture—Conversion of redeemable into irredeemable.

Conversion of "redeemable" debentures into "irredeemable ones is after all only a modification and cannot be questioned when effected by a general meeting of the debenture holders who were authorised under the trust deed to sanction any modification of the rights of the debenture holders against the company.

The Director of Public Prosecution v. Blady:

[1912] 2 K. B. 89.

Criminal law—Evidence—Admissibility—Prostitution of wife—Living on earning of prostitution—Evidence of wife.

The evidence of a wife is not admissible against her husband on the hearing of a charge against the husband of living on the earnings of prostitution of his wife contrary to the Vagrancy Act as the charge is not one affecting the liberty or person of the wife by force or fraud.

Cantiere Meccanico Brindisino v. Janson.

[1912] 2 K. B. 112.

Insurance—Concealment of defect—dock-seaworthiness admitted.

In this case the owners of a floating dock insured it against loss on a voyage: The policy which insured the dock against all usual perils contained the term "seaworthiness admitted." The dock was in a sound condition but to be seaworthy it required some strengthening. The owners thought that strengthening was unnecessary and it was capable of being towed to its destination. *Held* (by Scrutton, J.) that the underwriters, inasmuch as seaworthiness was admitted by the policy and the dock being a floating dock and as such not an ordinary sea going vessel were put on inquiry and the owners were not bound to disclose the absence of strengthening.

Poulton v. Kelsall: [1912] 2 K. B. 131 (C. A.)

Employers—Workman—Compensation—Special agreement—Strike.

A workman who was employed as a store-keeper acted as a carter during the carters' strike. The employers under a special contract agreed to be responsible for any injury that the carter might sustain. One day while returning home from work he was passing through a market not far from his employer's premises and was seriously injured. *Held* that the employer would not be liable as the accident did not happen in the course of the employment though he would be liable under the special agreement.

Atherton in re: [1912] 2 K. B. 257.

Bankruptcy—Debtor under arrest—Public examination—Questions tending to criminate—Practice—Bankruptcy Act.

Where a debtor is in custody or under remand on a criminal charge he is bound to answer all questions at his public examination in bankruptcy touching his conduct, dealings and property as the Court may put or allow to be put to him whether they tend to criminate him or not. The scope of the enquiry may extend to all matters which the Court may take into consideration under 38 of the Bankruptcy Act 1890 on the application for his discharge.

In re **Hart**: *Ex-parte* **Green**: [1912] 2 K. B. 257.

Bankruptcy—Voluntary Settlement—Transfer by donee after bankruptcy—Purchaser for value without notice—Title of Trustee.

A *bona-fide* purchaser for value without notice from the donee under a voluntary settlement after the act of bankruptcy committed by the settlor, is not entitled to hold the property against the trustee whom title relates back to the act of bankruptcy.

Manley & Sons, Ltd. *v.* **Burkett**: [1912] 2 K. B. 329.

Auctioneer—Action for price of goods sold—Debt due from owner to purchases—Set off.

A farmer employed plaintiffs, a firm of auctioneers to conduct the sale of his cattle. F. directed plaintiff to pay off all his creditors out of the proceeds of the intended sale and plaintiffs agreed to it. Pending sale plaintiffs had advanced certain sums and did work for them on the understanding that they should repay themselves out of the sale proceeds. F. meanwhile bought on credit certain cattle from the defendant a certain cattle dealer for £165. At the sale F. induced the farmer to bid at the auction and buy certain cattle for £ 195 on the terms that he should be at liberty to set off the original purchase money from the auction price. Plaintiff had no notice of this arrangement. In an action by plaintiff against defendant, the defendant claimed set off for the original sale price in £ 165 and as to the balance pleaded payment. The proceeds of the sale amounted to £ 987. Plaintiff's claims and the debts of F's creditor amounted to £ 959. *Held* that as to £27 the set off was good; but bad as to the residue of the plaintiff's claim remaining unpaid.

The Plasycold Collieries Company Ltd. *v.* **Partidge Jones & Co., Ltd**: [1912] 2. K. B. 345.

Landlord and tenant—Distress for rent—Purchase by landlord of goods distrained—Subsequent uses—Conversion.

In this case defendants the owners of a seam of coal let it to a tenant as tenant from year to year and the latter agreed to work the coal on payment of a royalty for each ton worked. The tenant sold to the plaintiff his right to the coal under the lease on payment of all sums that should become due in respect of the royalties. The plaintiffs worked the coal and had hired some waggons from a 3rd person. The royalties payable by the lessee fell into arrears and the landlord distrained the waggons and certain ponies. The landlord defendants had them appraised and bought them or purported to buy them at the appraised value. They then worked the ponies for their purposes and delivered the waggon to the waggon company on demand. In an action by the plaintiff for conversion, the sale to the defendants being found to be invalid the defendants relied on the Distress for Rent Act and contended that they would be liable only to damages sustained by plaintiff. *Held* that the acts complained of were done not as distrainors nor in the course of distress but as owners under their purchases and therefore they were liable for conversion.

Rex *v.* **Marshaw:** *Ex-parte* **Pethicle Lawrence:** [1912] 2 K. B. 362.

Justices—Summary conviction—Evidence unsworn at first hearing—Re-hearing—Jurisdiction to re-hear.

The defendant was convicted on a charge of assaulting a Police Constable while in the discharge of his duties. The two constables who gave evidence for the prosecution through some inadvertence were not sworn. The magistrate's attention being drawn to this in the course of the day the defendant was put on trial and convicted all the evidence being given on oath. A rule having been obtained to quash the conviction on the ground that the defendant had previously been in peril in respect of the same offence.

Held that the defendant was not legally convicted at the first hearing and therefore was not in peril at the time of the 2nd hearing and the conviction was right.

In re **Teale** : *Ex-parte* **Blackburn** : [1912] 2 K. B. 367.

Bankruptcy—Petition—Dismissal—Order made on appeal—Relation back of order—Protection of transactions in the interval —Bankruptcy Act.

In this case a bankruptcy petition was filed against one and the petition "was dismissed on July 22, 1910." On appeal a receiving order was made on 24th October and in accordance with the usual practice the order was dated July 22 that being

the date when the order ought to have been made. Between the two dates the debtor had paid some moneys into a bank and drawn the amount. The bank had no knowledge of the act of bankruptcy till November 2nd. On the bank being sued for the amount *Held* that the transaction was protected by S. 49 of the Bankruptcy Act and that the antedating of the order could not have been intended to affect them.

JOTTINGS AND CUTTINGS.

A Bill to strengthen the Judicial Committee of the Privy Council.—The Lord Chancellor has now virtually settled (says the London Correspondent of the *Manchester Guardian*) the details of the Bill which he proposes shortly to introduce in the House of Lords to strengthen the Judicial Committee of the Privy Council. At present the House of Lords is the Supreme Court of Appeal for the United Kingdom, and the Judicial Committee is the Supreme Court of appeal for the Dominions, Colonies and India. The decisions of the latter have not given satisfaction, so it was proposed at the last Imperial Conference to take a first step towards combining the two Courts into a Supreme Court of Appeal for the Empire, and towards strengthening them by adding to the number of judges composing them. The proposals agreed upon were embodied in a Bill, which was withdrawn owing to opposition. The provisions of the Bill have now been modified, and instead of a combination of the elements of the two final Courts of Appeal, with the addition of two selected judges the Judicial Committee is to maintain its separate existence, but is to be strengthened by the addition of assessors, who will be chosen for their special knowledge of the subjects of the cases to be decided. The Lord Chancellor will preside, and all who are now qualified to sit in the Judicial Committee will be able to sit under the new scheme. It is also proposed that in accordance with the wishes expressed by the Governments of the Dominions the practice of the Judicial Committee shall be modified so that in Dominion cases any dissentient judge may be free to give his reasons if His Majesty's consent is given to this change.—*The Law Journal.*

* * *

'*In Camera*':—To disclaim jurisdiction or the right to interfere is seldom a satisfactory way of dealing with any substantial legal controversy, least of all where the liberty of the subject is involved. It is to be regretted, therefore, that a majority of the Lords Justices of Appeal have declined to review Mr. Justice Bargrave Deene's unprecedented assertion of a right to visit with the penalties for contempt the communication of a report of pro-

ceedings *in camera* in his Court, on the ground that the order for the hearing *in camera* was made in 'a criminal matter,' and that the contempt was of 'a criminal nature.' The plain man will decline to believe that Mrs. Scott's successful suit for a decree of nullity of marriage was a criminal matter, or that the sending of a copy of the official shorthand-writer's notes of the proceedings to three persons interested in the suit in order to vindicate her character and position was a criminal contempt—an offence against the majesty of justice, punishable, as all such contempts are, by imprisonment without limit, and without appeal, at the discretion of the judge who heard the case.

If would be a pity if a case raising such extraordinary issues should go off on the ground that there is no machinery in our Courts for an appeal from such an exercise of an arbitrary power of control over suitors, or on the even more technical ground that the Act which created the Court of Appeal excluded that Court's jurisdiction by enacting, in the section which made provision for the hearing of questions of law arising in criminal trials (the Judicature Act, 1873, Sec. 47), that 'no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record.' It is true that, in accordance with a dictum of Lord Esher, when Master of the Rolls, these excluding words have been given a very wide interpretation, but even he laid it down that they were restricted to proceedings 'the subject matter of which is criminal' (*In re Woodhall* [1888]). And it has been held that an appeal does lie in contempt cases where the order disobeyed is in respect of something 'the doing or not doing of which is not a criminal act' (*Barnardo's Case* [1891]), against committals in bankruptcy matters, though in the nature of punishment for an offence (*In re Hibbard* [1902]), and even against attachments for neglect to obey a writ of *habeas corpus*, which is one of the grossest forms of contempt (*Regina* v. *Barnardo* [1875]). It is significant, too, having regard to the source from which the practice of making orders for hearings *in camera* came, that in the case of ecclesiastical offences, contempt and contumacy are not regarded as criminal matters within the section *Dale's Case* [1881], and that the Court of Appeal has never declined jurisdiction in such cases. The fact is that the character, civil or criminal of an interlocutory matter—such as contempt—is governed by the character, civil or criminal, of the proceedings to which it is adjective or ancillary; and unless a nullity suit or an order made in it can be regarded as a criminal proceeding—a proposition which it must be difficult seriously to

maintain—the excluding words of the section on which the majority of the Lords Justices founded their judgments cannot apply.

On the larger question of the power and the effect of making orders for hearings *in camera*, the Master of the Rolls laid it down broadly that ' the publication of, *in camera* proceedings is a clear defiance of the order of the Court, and may properly be punished as such,' and he cited as an authority for this proposition (*The King* v. *Clements* [1821] 4 B. and Ald. 218.) The case, which arose out of the trial of Thistlewood for high treason, is instructive as showing the real grounds and limits of the jurisdiction. Lord Chief Justice Abbott, one of the justices before whom Thistlewood was tried, before the commencement of the trial stated publicly that as there were several other persons charged in the same indictment whose trials were likely to be taken one after another, he thought it necessary strictly to prohibit the publishing of the proceedings until the whole trial should be brought to a conclusion; and all persons were required to attend to that admonition. While the trials were still proceeding the defendant published in his paper, ' *The Observer*,' an account which included the witnesses' evidence, and notice of motion was given for his committal for contempt for printing the account ' pending the proceedings ' contrary to the order of the Court and ' to the obstruction of public justice.' All the judgments on that application turned upon the contempt of Court in ' prejudicing the world' with regard to the merits of the case before it was heard, and Mr. Justice Bayley expressly based the jurisdiction to make the order restricting publication on the authority of the Court ' to make any order which they might judge to be necessary in order to preserve the purity of the administration of justice *in the course of the proceedings then depending before them*, and to prohibit any publication which might have a tendency to prevent the fair and impartial consideration of the case.' He entirely disclaimed and repudiated the suggestion that if the Court had this power of prohibiting publication there was no limit to it, and that they might prohibit altogether any publication of the trial; while Mr. Justice Holroyd expressly defended the order on the ground that ' it was made to remain in force so long and so long only, as those proceedings should be pending.' ' The order,' said he, 'was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination.' These are reasonable grounds for the exercise of such an exceptional power and they indicate, too, the limits of the judges' jurisdiction. It is an offence against the public, and therefore a criminal act which

the Court may put down *breve manu*, to interfere with the administration of justice; it is no such offence, and therefore no crime, to communicate to persons interested the evidence in a civil suit after the close of the proceedings, and the order of a judge that—for reasons which concern the parties only and not the public—the hearing shall be *in camera* cannot create the offence. Perpetual secrecy cannot be made condition of justice, and it would be against public policy to demand it.

Lord Justice Fletcher Moulton, in his dissenting judgment, did not go too far when he said that to give an order for a hearing *in camera* such an interpretation 'would make it an order which would be *ultra vires* of any judge or of any court.' The Judge has complete control over the proceedings while the parties are before him, and he may take all measures necessary at the instance of any one of them to enforce the relief which he has granted according to law, but 'beyond and besides this the Court acquires no power or jurisdiction over an individual by reason of his having become a litigant.' Any direction which goes beyond the relief which the Court has power to grant is *brutum fulmen*, it is pronounced without authority derived either from the status or prerogatives of the Judge. The learned Lord Justice was incontestably right when he declared that 'there is on record no case where the Courts have asserted a right to control the personal acts of litigants after the conclusion of the suit, except to enforce the relief granted,' and we agree with him that it is a serious thing at this time of day for the administrators of justice to encroach on the liberty of the subject by an assertion of judicial power not warranted by precedent nor supported by any legislative enactment. His conclusion that 'nothing could be more detrimental to the administration of justice in any country than to entrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy' is instinct with finest principles which have ever governed our Judicature, and we do not hesitate to say that the authority of the Courts will itself be endangered if the judgment of the majority stands and judges of first instance are permitted to amplify their jurisdiction by theories of what Lord Erskine called 'constructive contempt,' while appellate tribunals disclaim any right or power to control arbitrary assertions of their newfound prerogative. The ultimate tribunal of appeal has still to speak, and there should be no occasion for the demand which is now freely made—we hope, and believe, quite prematurely—for legislative interference to put on a

safe footing this supremely important matter affecting the rights of suitors in all the King's Courts.—*The Law Journal.*

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Dullness of Civil Courts.—The Civil Court is a place of gloom; and though the Judges do their best to enliven it, they are usually repressed by the solemnity of the advocates.

Dust from the Law Courts.

* * *

Decline of modern advocacy.—There is probably nothing which has done so much to debase the style of modern advocacy as the introduction of non-jury causes. Since the Judicature Acts came into operation a large number of cases have been tried before a Judge alone, and the proportion of these shows a tendency to increase. It is not to be wondered at that the advocate, doing much of his work under these novel conditions, had modified his style accordingly. Evolution has produced a new type, and the common-law leader is no longer of a different species from his brother who practises in equity. The main difference left is that the Chancery silk, who attaches himself to a particular Court, has only to mould himself to the idiosyncrasies of one Judge. The common-law man, on the other hand, must adapt himself to fifteen, and when he has made a life long study of these he may be suddenly confronted with a Chancery Judge taking non-juries after all. Such a convulsion of nature might well have disconcerted even an Erskine or a Scarlett. The conduct of a case under these circumstances demands an entirely new set of faculties on the part of an advocate.—*Ibid.*

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Decadence of Oratory.—The decadence of the orator is the natural consequence of the evolution of the modern trial. Judges sitting without Juries, official referees, and professional arbitrators, have curbed the fancy and emasculated the eloquence of the ambitious advocate: and many a mute, inglorious Erskine has doubtless pined in obscurity, or withered speechless at the portals of the commercial Court. A very learned official referee is reported lately to have said that the language of metaphor fatigued him; and even common Jury men, taught by their betters yawn cynically when the poor flowers of present day eloquence are offered for their delectation. Thus to find the ideal advocate, one wood look for a chartered accountant, accustomed to read the lessons in his Parish Church.—*Ibid.*

* * *

Decline of appreciation of oratory—It has naturally happened, that as the practical value of oratory has diminished, so the power of appreciating its beauties even if confessedly meretricious—has almost died out. Giants there were, no doubt, in the days of old; and much havoc they wrought when they went out to war, belabouring each other with resounding the oak; but we of to-day find it hard to understand the secret of their prowess. We read the effusions of Erskine, of Brougham, or of Scarlett, without admiration, without emotion, without any sentiment but that of cultured indifference.

One explanation of this phenomenon may perhaps be that the realities of life are essentially transitory. The struggles, the achievements, the virtues, the vices of the past lose something of their interest with every century. Fiction poetry, have the secret of immortality and perpetual youth. Is there anything in ancient history which kindles our imagination, except that which is impossible or untrue?—*Dust from Law Courts.*

* * *

Length of trials.—It is more difficult to understand another change which has taken place of late years in the trial of civil cases. I mean the increase in their duration. That an action should occupy a Judge and Jury for whole week is now-a-days considered nothing extraordinary. Most seriously contested special Jury cases last a couple of days; and on circuit one constantly sees the first common Jury barely finished at the end of a long day's sitting. One ready mode of explaining this is to set it down to the prolixity of council; and no doubt there are some members of the Judicial Bench who are of this opinion. It would be almost as reasonable, in my humble judgment, to attribute it to the increased volume of the Judge's notes. The fact is, that the material is usually present in increasing and almost unmanageable quantity, and it becomes necessary to deal with it. There has been an enormous increase in modern times in the habit of letter-writing, both in social and business life; and every one of practical experience knows that a large amount of the time consumed in a civil cause is taken up by reading and commenting on the correspondence. The speeches of Counsel are no doubt longer than they used to be, but so, in the majority of instances, is the summing-up. One has only to compare the present day reports with those of "Barenwall and Alderson," or "Meeson and Wellsby," to see that a similar change has taken place in the Judgments delivered by Judges. I cannot find anything in the Judicature Acts

which accounts for this; and I believe that the real cause is to be looked for in the increased complexity of human affairs, rather than in any diminution in the conscientiousness or ability of the advocates. Whatever the cause may be, the effect upon the ordinary level of forensic oratory is undeniable. Few speakers can be entertaining for longer than a few minutes—or perhaps seconds. None can be consistently eloquent for more than half an hour. He, therefore, who is compelled to go on talking for a whole day cannot expect, to give pleasure to anybody—except perhaps to his client.—*Ibid.*

* * *

Prolixity of arguments:—One form of prolixity may be mentioned for which I think the advocate is not wholly responsible, if indeed he ever is (which I greatly doubt). I refer to the long-drawn arguments which take up so much time of the Court of Appeal. I do not know any member of the Bar who could argue for more than an hour about anything, if he were left severely alone, without any attempt being made by the Bench to convince him that he is wrong. The best illustration of any meaning is given by the well-worn story of genial chancery leader who was asked by the Court of Appeal if he had taken the point which he was arguing in the Court below. "I did, my lord," was the reply, "but the learned Judge stopped me." "How did he do that, Mr. Blank?" inquired the President, with awakened interest. "By fraudulently pretending, my lord," said the indignant advocate, "He was in my favour;" The other side of picture, however, is vividly represented by the story told by a brilliant after dinner speaker at the banquet given to the American Bar in the Middle Temple Hall some years ago " Mr. Jones". Mr. Jones, said the wearied President of the United States Supreme Court, " you must give this Court credit for knowing *something*." "That's all very well," replied the advocate (who came from a Western State), " but that's exactly the mistake I made in the Court below!"—*Ibid.*

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Length of modern Judgments:—It may be that the prolixity of the arguments in the Court of Appeal has reacted upon the length of the judgments of that tribunal, which certainly sometimes extend to portentous length.—*Ibid.*

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The following story is related of Sir Arthur Collins, the late Chief Justice of the Madras High Court.—There was above some years ago tried by the then Recorder of Poole—now Sir Arthur Collins in which a person who was accused was a professional acrobat of great physical strength, who earned part of his living by submitting to be bound with ropes in the street and then bursting his bonds like Samson of some alleged larceny. He was committed to the Sessions, and in the meantime he was confined in the local prison at Poole. There was only one elderly male in this establishment to discharge the duties of warder, who was completely terrorized by his formidable guest, and the prisoner eventually came up for trial with two indictments against him for assaulting the gaoler, in addition to the original charge. His main defence was that he had not been properly fed; and he caused to be produced to the Court nearly a score of specimens of Irish stew, preserved in large glass jars for the occasion. These he invited the Recorder and the prosecuting Counsel to smell. (Sir Arthur as he afterwards became) treated him with the utmost politeness until the Jury had convicted him, when he astonished the ruffian by sentencing him to penal servitude for seven years. The prisoner promptly threw a heavy leaden inkstand, which just missed the Recorder's head and he was then dragged out of dock by six police men, declaring in the most frightful language that he would cut out the judicial liver as soon as he was released. After this incident Arthur Collins remained on the circuit for six years more and then applied for and obtained an Indian Judgeship—*Dust from Law Courts.*

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Appointment of additional Judges in England.—A rumour grows (says the *Daily Telegraph*) that the angry protests of the Bench and the Bar are not to go entirely unheeded. Greatly daring, the Government, it is said, is about to cause one additional judge to be appointed. That is to say, it will do so after the Long Vacation. Many names are mentioned. Two K. C.'s with safe seats, one K.C. of great professional eminence, another K.C. whose claims are both political and professional, and a distinguished stuffgownsman are all popular candidates. Were Mr. Rowlatt appointed he would become a judge after a 'devilship' to the Attorney-General of six years. Sir Henry Sutton served for fifteen before he ascended the Bench. Wright, J., was 'devil' for seven years (1883-1890); A. L. Smith, M.R., for four (1879-1883); Lord Bowen

for seven (1872-1879); Archibald, J., for four (1868-1872); and Lord Hannen for five (1863-1868). The promoted devils form on the whole, a very distinguished group.—*The Law Journal.*

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We beg to acknowledge the receipt of the following publications.

1, The Practice of the Privy Council in Judicial Matters. By Norman Bentwich Barrister-at-Law. London: Sweet and Maxwell Ltd, 3 Chancery Lane W. C. Price Re. 21*s*.

2. Maxwell on the Interpretation of Statutes. Fifth Edition. By F. Stroud of Lincoln's Inn, Barrister-at-Law London: Sweet and Maxwell Ltd, 3 Chancery Lane W. C. Price 25*s*.

3. Lindley on Partnerships. Eighth Edition. By the Hon'ble W. B. Lindley a Judge of the County Court, T. J. C. Tomlin, M.A., B. C. L., Barrister-at-Law, and A. A. Attwate, B. C. L.. Barrister-at-Law. With an appendix on the Law of Scotland by J. C. Loreiner, L. L. B., Advocate. London: Sweet and Maxwell, Ltd, 3 Chancery Lane. Price 42*s*.

4. Caste in Courts. By L. T. Kikani, Pleader. Rajkote: Ganatra Printing Works. 1912.

5. A Digest of the Law of Agency. By William Bowstead, Bar-at-Law. Fifth Edition. Price 18*s*. Sweet and Maxwell Ltd London..

6, Principles of Hindu Law by D, F. Mulla. Price Rs. 5.